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COURT CAPTION.

September 25, 1944.

Being the Fourth Monday of September, 1944.

Be It Remembered That at a District Court of the United States Begun and Held for the Nashville Division of the Middle District of Tennessee at the Federal Court Room in the City of Nashville, Tennessee, Within Said District and the Sixth Circuit, on the Fourth Monday, It Being the 25th Day of September, 1944.

Court Met Pursuant to Adjournment for the Middle District of Tennessee When the Following Proceedings Were Had, To-Wit:

Present L. B. Ormes, Clerk, and Reed Sharp, United States Marshal, for the Middle District of Tennessee:

The regular (statutory) September 1944 Term of Court for the Nashville Division for the Middle District of Tennessee was duly opened and adjourned until 10:00 O'clock A. M. October 2, 1944, at which time the trial of cases for said term will commence.

Complaint

In the

DISTRICT COURT OF THE UNITED STATES

For the Middle District of Tennessee

Nashville Division

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION UNITED STATES DEPARTMENT OF LABOR,
Plaintiff,
v.
THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY,
Defendant.

Civil Action File No. 524

COMPLAINT.

(Filed December 19, 1944.)

I.

Plaintiff brings this action to enjoin defendant from violating the provisions of Sections 15 (a) (2) and 15 (a) (5) of the Fair Labor Standards Act (Act of June 25, 1938, c. 676, 52 Stat. 1060; U. S. C. Title 29, Sec. 201 et seq.) hereinafter called the Act.

II.

Jurisdiction of this action is conferred upon the court by Section 17 of the Act.

III.

Defendant is, and at all times hereinafter mentioned was, a corporation existing by virtue of the laws of the State of Tennessee, having its principal office at 930 Broad Street, city of Nashville, State of Tennessee, within the jurisdiction of this Court. Defendant is, and at all times hereinafter mentioned was, engaged in the operation, as

essential instrumentalities of interstate commerce, of a railway system, shops, yards, terminals, offices, and other railway facilities in several States, including Tennessee, Alabama, Georgia and Kentucky, which were regularly engaged in the interstate transportation of passengers, freight, mail, express, and baggage, and which were operating in interstate commerce to and from States other than the State of Tennessee, and in furnishing railroad terminal facilities to other railroads engaged in interstate commerce.

IV.

Defendant is, and at all times hereinafter mentioned was, employing approximately 12,000 employees in and around its railway system, shops, yards, terminals, offices, and other railway facilities in the operation, as essential instrumentalities of interstate commerce of such railroad system, terminals, shops, and offices. Substantially all of the duties performed by defendant's employees are essential to the movement in interstate commerce of locomotives, cars, trains, persons, freight, express, mail, and baggage in the active course or transportation to and from other States, and are an essential and integral part of interstate commerce.

V.

Defendant repeatedly violated and is violating the provisions of Sections 6 and 15 (a) (2) of the Act by paying to a number of its employees for their employment in interstate commerce, as aforesaid, wages at rates less than 30 cents an hour from October 24, 1940, to March 1, 1941; less than 36 cents an hour from March 1, 1941, to August 31, 1942; and since August 31, 1942, less than 40 cents an hour, said rates of 36 cents and 40 cents an hour being the minimum wage rates made applicable to the defendant's employees by the two wage orders for the Railroad Carrier Industry heretofore promulgated pursuant to Sections 5 and 8 of the Act by the Administrator of the Wage and Hour Division, United States Department of Labor, and which, after publication in the Federal Register, be-

came effective respectively on March 1, 1941, and August 31, 1942. Copies of said wage orders are hereto attached as exhibits A and B.

VI.

On October 21, 1938, the Administrator of the Wage and Hour Division, United States Department of Labor, pursuant to the authority conferred upon him by Section 11 (c) of the Act, duly issued and promulgated regulations prescribing the records of persons employed and of wages, hours, and other conditions and practices of employment to be made, kept, and preserved by every employer subject to any provision of the Act. The said regulations, and amendments thereto, were published in the Federal Register and are known as Title 29, Chapter V, Code of Federal Regulations, Part 516.

VII.

Defendant, an employer subject to the provisions of the Act, repeatedly has violated and is violating the provisions of Sections 11 (c) and 15 (a) (5) of the Act, in that since October 24, 1940, it has failed to make, keep, and preserve adequate and accurate records of its said employees referred to as "cubs" and "trainees" as to the wages, hours, and other conditions and practices of employment maintained by it, as prescribed by the said regulations, in that the records kept by defendant failed to show adequately and accurately, among other things, the hours worked each workday and the total hours worked each workweek.

VIII.

The violations alleged in paragraphs V and VII hereof occurred with reference to approximately 225 of defendant's employees, including firemen, switchmen, stenographers, yard clerks, office clerks, messengers, callers, and porters during so-called "training periods" ranging from two or three days to several weeks, during which time said employees are actively engaged in the performance or operation of some essential phase of defendant's ac-

tivities or facilities, but receive no compensation for their employment, are not listed or carried on defendant's pay rolls, and no records are kept by the defendant of their hours of work or conditions of employment.

Employees designated as "trainees" or "cubs" upon applying for employment with the defendant are required by defendant to learn the duties of the job for which they apply under the supervision of an experienced employee of defendant by observation and by performing the manual, physical or clerical work concerned with the job for which they apply, during which time no compensation is paid to such employees. Upon becoming familiar with the duties of his position, and in some cases passing an examination concerning those duties, the so-called "trainees" or "cubs" are placed upon the pay roll of defendant and paid at the established rate for a person in that position. In the case of firemen and switchmen in the event the employee completes the so-called training period and is placed upon the pay roll he is paid $5 per day for each day of his so-called training period. The other employees referred to receive no compensation whatever for the time spent and the hours worked during the so-called "training period," and the firemen and switchmen if they should quit before completing the so-called "training period" in most cases receive no compensation for the time spent and the hours worked in the uncompleted so-called "training period."

IX.

Defendant has, since the effective date thereof, repeatedly violated the aforesaid provisions of the Act. A judgment enjoining and restraining the violations hereinabove alleged is specifically authorized by Section 17 of the Act.

Wherefore, cause having been shown, plaintiff demands judgment permanently enjoining and restraining defendant, its officers, agents, servants, employees, and attorneys, and all persons acting or claiming to act in its be-

half and interest, from violating the provisions of Sections 15 (a) (2) and 15 (a) (5) of the Act, and such other and further relief as may be necessary and appropriate.

DOUGLAS B. MAGGS,
Solicitor of Labor.
ARCHIBALD COX,
Associate Solicitor.
JETER S. RAY,
Regional Attorney.
PAUL M. CADRA,
Associate Attorney.

Post Office Address:
c/o Solicitor of Labor,
U. S. Department of Labor,
503 Medical Arts Building,
Nashville 3, Tennessee,
or
Solicitor of Labor,
U. S. Department of Labor,
Washington, D. C.

Attest: A True Copy.

L. B. ORMES, Clerk,
U. S. District Court,
Middle District of Tennessee.
By INEZ SHELTON, D. C.

(Seal)

Exhibit "A" to Complaint

EXHIBIT "A".

For Release Friday, February 14, 1941. **R-1277**

**U. S. Department of Labor,
Wage and Hour Division,
Washington.**

Title 29—Labor.

Chapter V—Wage and Hour Division.

In the Matter of the Recommendations of Industry Committee No. 9 for Minimum Wage Rates in the Railroad Carrier Industry

Wage Order.

Effective March 1, 1941.

Part 591—Minimum Wage Rates in the Railroad Carrier Industry.

Whereas, on November 2, 1939, pursuant to Section 5 of the Fair Labor Standards Act of 1938, hereinafter called the Act, the Acting Administrator of the Wage and Hour Division of the United States Department of Labor, by Administrative Order No. 34, appointed Industry Committee No. 9 for the Railroad Carrier Industry, herein called the Committee, and directed the Committee to recommend minimum wage rates for the Railroad Carrier Industry in accordance with Section 8 of the Act; and

Whereas, the Committee included four disinterested persons representing the public and a like number of persons representing the employees in the Railroad Carrier Industry, and a like number representing employers in the Industry, and each group was appointed with due regard to the geographical regions in which the Railroad Carrier Industry is carried on; and

Whereas, on August 15, 1940, after investigation of conditions in the Industry, the Committee filed with the Administrator a report containing the recommendations for

a 36 cent per hour minimum wage rate in the Trunk Line Division of the Railroad Carrier Industry, and for a 33 cent per hour minimum wage rate in the Short Line Division of the Railroad Carrier Industry; and

Whereas, after notice published in the Federal Register on August 23, 1940, Henry T. Hunt, Esquire, the Presiding Officer designated by the Administrator, held a public hearing upon the Committee's recommendations at Washington, D. C., on September 23 and 24, 1940, at which all interested persons were given an opportunity to be heard; and

Whereas, the complete record of the proceeding before the Presiding Officer was transmitted to the Administrator; and

Whereas, all persons appearing at said public hearing before the Presiding Officer were given leave to file briefs on or before November 18, 1940; and

Whereas, oral argument was held on November 25, 1940, before the Administrator; and

Whereas, the Administrator, upon reviewing all the evidence adduced in this proceeding and giving consideration to the provisions of the Act, with special reference to Sections 5 and 8, concludes that the Committee's recommendations for the Railroad Carrier Industry, as defined in Administrative Order No. 34, are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the Committee, will carry out the purposes of Section 8 of the Act; and

Whereas, the Administrator has set forth his decision in an opinion entitled "Findings and Opinion of the Administrator in the Matter of the Recommendations of Industry Committee No. 9 for Minimum Wage Rates in the Railroad Carrier Industry," dated this day, a copy of which may be had upon request addressed to the Wage and Hour Division, Washington, D. C.;

Exhibit "A" to Complaint

Now, Therefore, It Is Ordered That

Section 591.1 Approval of Recommendations of Industry Committee

The Committee's recommendations are hereby approved, and, in accordance with such recommendations,

Section 591.2 Wage Rates

(a) Wages at a rate of not less than 36 cents an hour shall be paid under Section 6 of the Act by every employer to each of his employees in the Trunk Line Division of the Railroad Carrier Industry who is engaged in commerce or in the production of goods for commerce;

(b) Wages at a rate of not less than 33 cents an hour shall be paid under Section 6 of the Act by every employer to each of his employees in the Short Line Division of the Railroad Carrier Industry who is engaged in commerce or in the production of goods for commerce; and

Section 591.3 Posting of Notices

Every employer employing any employees so engaged in commerce or in the production of goods for commerce in the Railroad Carrier Industry shall post and keep posted in a conspicuous place in each department of each of his establishments where such employees are working such notices of this Order as shall be prescribed from time to time by the Wage and Hour Division of the United States Department of Labor, and shall give such other notice as the Division may from time to time prescribe; and

Section 591.4. Definition of Railroad Carrier Industry and Divisions thereof

The Railroad Carrier Industry and the divisions thereof to which this Order shall apply are hereby defined as follows:

For the purpose of this Order the term "Railroad Carrier Industry" means the industry carried on by any express company, sleeping car company or car-

rier by railroad, subject to Part I of the Interstate Commerce Act, and by any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith and which operates any equipment or facility or performs any service (except trucking service, casual service and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and by any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such company or carrier by railroad: Provided, however, That the term "Railroad Carrier Industry" shall not include the industry carried on by any street, interburban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power.

(a) The term "Trunk Line Division," as used in this Order, means the industry carried on (1) by an express company, switching company, terminal company or sleeping car company subject to Part I of the Interstate Commerce Act, (2) by any carrier by railroad subject to Part I of the Interstate Commerce Act having annual operating revenues of more than one million dollars ($1,000,000) as shown by such carrier's last annual report to the Interstate Commerce Commission or other regulatory body, and (3) by any company which is directly or indirectly owned or controlled by one or more such carriers, by one or more carriers under (b) hereof or by one or more such carriers jointly with one or more carriers under (b) hereof or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service and

the casual operation of equipment or facilities), in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and by any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such company or carrier by railroad: Provided, however, That the term "Trunk Line Division" shall not include the industry carried on by any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power;

(b) The term "Short Line Division," as used in this Order, means the industry carried on by any carrier by railroad, subject to Part I of the Interstate Commerce Act, having annual operating revenues of less than one million dollars ($1,000,000) as shown by such carrier's last annual report to the Interstate Commerce Commission or other regulatory body, and by any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such carrier by railroad: Provided, however, That the term "Short Line Division" shall not include the industry carried on (1) by any carrier or company included within paragraph (a) hereof or (2) by any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power.

Exhibit "B" to Complaint

Section 591.5. Effective Date.

This Wage Order shall become effective March 1, 1941.

Signed at Washington, D. C., this 12th day of February, 1941. Sections 591.1 to 591.5 inclusive, issued under the authority contained in Sec. 8, 52 Stat. 1064; 29 U. S. C., Sup. IV, 208.

PHILIP B. FLEMING,
Administrator,
Wage and Hour Division,
U. S. Department of Labor.

Published in Federal Register, February 14, 1941.

EXHIBIT "B".

For Release Saturday
August 15, 1942

R-1848

U. S. Department of Labor
Wage and Hour Division

Title 29—Labor

Chapter V—Wage and Hour Division

In the Matter of the Recommendations of Industry Committee No. 44 for Minimum Wage Rates in the Railroad Carrier Industry

Wage Order

Effective August 31, 1942

Part 624—Minimum Wage Rates in the Railroad Carrier Industry.

Whereas, on April 4, 1942, pursuant to Section 5 of the Fair Labor Standards Act of 1938, hereinafter called the Act, the Administrator of the Wage and Hour Division of the United States Department of Labor, by Administrative Order No. 147, appointed Industry Committee No. 44 for the Railroad Carrier Industry, herein called the Committee, and directed the Committee to recommend minimum wage

rates for the Railroad Carrier Industry in accordance with Section 8 of the Act; and

Whereas, the Committee included four disinterested persons representing the public and a like number of persons representing the employees in the Railroad Carrier Industry, and a like number representing employers in the Industry, and each group was appointed with due regard to the geographical regions in which the Railroad Carrier Industry is carried on; and

Whereas, on April 29, 1942, after investigation of conditions in the Industry, the Committee filed with the Administrator a report containing its recommendations for a 40 cent per hour minimum wage rate in the Railroad Carrier Industry; and

Whereas, after notice published in the Federal Register on June 23, 1942 Major Robert N. Campbell, the Presiding Officer designated by the Administrator, held a public hearing upon the Committee's recommendations at New York, New York, on July 15, 1942, at which all interested persons were given an opportunity to be heard; and

Whereas, the complete record of the proceeding before the Presiding Officer was transmitted to the Administrator; and

Whereas, although all persons appearing at said public hearing before the Presiding Officer were given leave to file briefs on or before August 5, 1942, no briefs were filed; and

Whereas, the Administrator, upon reviewing all the evidence adduced in this proceeding and giving consideration to the provisions of the Act, with special reference to Sections 5 and 8, concludes that the Committee's recommendations for the Railroad Carrier Industry, as defined in Administrative Order No. 147 are made in accordance with law, are supported by the evidence adduced at the hearing, and, taking into consideration the same factors as are required to be considered by the Committee, will carry out the purposes of Section 8 of the Act; and

Whereas, the Administrator has set forth his decision in an opinion entitled "Findings and Opinion of the Adminis-

trator in the Matter of the Recommendations of Industry Committee No. 44 for a Minimum Wage Rate in the Railroad Carrier Industry," dated this day, a copy of which may be had upon request addressed to the Wage and Hour Division, 165 West 46 Street, New York, New York.

Now, Therefore, It Is Ordered That

Section 624.1 Approval of Recommendations of Industry Committee.

The Committee's recommendations are hereby approved, and in accordance with such recommendations,

Section 624.2 Wage Rate.

Wages at a rate of not less than 40 cents an hour shall be paid under Section 6 of the Act by every employer to each of his employees in the Railroad Carrier Industry who is engaged in commerce or in the production of goods for commerce; and

Section 624.3 Posting of Notices.

Every employer employing any employees so engaged in commerce or in the production of goods for commerce in the Railroad Carrier Industry shall post and keep posted in a conspicuous place in each department of each of his establishments where such employees are working such notices of this Order as shall be prescribed from time to time by the Wage and Hour Division of the United States Department of Labor, and shall give such other notice as the Division may from time to time prescribe; and

Section 624.4 Definition of Railroad Carrier Industry.

The Railroad Carrier Industry to which this Order shall apply is hereby defined as follows:

For the purpose of this Order the term "Railroad Carrier Industry" means the industry carried on by any express company, sleeping car company or carrier by railroad, subject to Part I of the Interstate Com-

merce Act, and by any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and by any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such company or carrier by railroad: Provided, however, That the term "Railroad Carrier Industry" shall not include the industry carried on by any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power.

Section 624.5 Effective Date.

This Wage Order shall become effective August 31, 1942.

Signed at New York, N. Y. this 13th day of August, 1942. Sections 624.1 to 624.5, inclusive, issued under the authority contained in Sec. 8, 52 Stat. 1064; 29 U. S. C., Sup. IV, 208.

L. METCALFE WALLING,
Administrator,
Wage and Hour Division,
U. S. Department of Labor.

Published in Federal Register August 15, 1942.

Summons

SUMMONS.

(Issued December 21, 1944.)

DISTRICT COURT OF THE UNITED STATES

for the
Middle District of Tennessee,
Nashville, Division

Civil Action File No. 524

L. METCALFE WALLING, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION UNITED STATES DEPARTMENT OF LABOR,
Plaintiff

v.

THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY,
Defendant

} Summons

To the above named Defendant:

You are hereby summoned and required to serve upon Hon. Jeter S. Ray, Regional Attorney, Wage & Hour Division, plaintiff's attorney, whose address is—

% Wage & Hour Division,
Medical Arts Building,
Nashville, Tennessee.

an answer to the complaint which is herewith served upon you, within Twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

L. B. ORMES,
Clerk of Court.

By /s/ H. LONDON,
Deputy Clerk.

Date: December 21st, 1944 [Seal of Court]

Return on Service of Writ.

Nashville, Tennessee

I hereby certify and return, that on the 21st day of December, 1944, I received the within summons executed same by reading and leaving a copy of summons and complaint with W. H. Swiggart, Gen. Counsel for N. C. & St. L. Ry., This December 21st, 1944.

REED SHARP,
United States Marshal.

By /s/ GEORGE BRAGG,
Deputy United States Marshal.

Marshal's Fees

Travel	**$ .06**
Service	**2.00**
	2.06

Subscribed and sworn to before me, a ..... this ..... day of ..... 19...

[Seal]

.....

Note.—Affidavit required only if service is made by a person other than a United States Marshal or his deputy.

ANSWER.

(Filed January 9, 1945.)

I.

Defendant admits the allegations contained in Paragraphs I, II, III, and IV of the Complaint.

II.

Defendant denies the allegations contained in Paragraph V of the Complaint.

III.

Further answering Paragraph V, defendant avers that at all times since the effective date of the Fair Labor Standards Act it has endeavored carefully and in good faith to comply therewith. From time to time defendant has authorized and permitted applicants for employment as clerks, messengers, callers and office porters to familiarize themselves with its method of work and assignment to enable them to qualify in the positions for which they sought employment. This has been done by permitting them to acquaint themselves with the work and duties of employees who were paid to do the particular work with respect to which instruction was sought by applicants. For example, an applicant for position as messenger has been permitted to accompany a regularly assigned and paid messenger to acquaint himself with the route and the assignments of such messenger, and an applicant for the position of yard clerk has been permitted to accompany a regularly assigned and paid yard clerk to acquaint himself with the duties and assignments of such clerk. In all such cases the applicant has been a student and observer of a specific employee or employees who has been paid to do the particular work. Prior to the effective date of the Fair Labor Standards Act these applicants were not compensated during such period of training. This period of training, or "posting" as it has been generally known in the railroad industry, was brief and averaged only a few days.

When the Fair Labor Standards Act became effective, defendant's Management recognized the possibility that

such applicants on rare occasions might perform a beneficial service for defendants at the same time that the regular employees were doing a similar but not identical assignment. In a bona fide effort to avoid any possible violation of the Act, defendant's Management elected and proceeded to treat such applicants as if subject thereto. The various divisional superintendents and other supervisory officials of defendant were instructed to pay student clerks, messengers, callers and office porters wages in conformity with the Act and to keep records as prescribed pursuant to the Act.

So far as the Management of defendant knew these instructions were understood and were being observed. However, when a suit similar in all respects to the present one was filed by the Administrator of the Wage and Hour Division against defendant at Chattanooga, Tennessee, on November 29, 1944, (later dismissed for reasons of venue with the present suit filed at the time of such dismissal) defendant's Management discovered on information furnished by representatives of the Wage and Hour Division that at one point only, to wit, Cravens Yard at Chattanooga, Tennessee, the Chief Clerk in the office there had permitted individuals to post or train for positions as clerks, porters, callers and messengers without compensation during the period of "posting." Defendant's Management promptly reprimanded such Chief Clerk, directed that this local practice at Chattanooga be discontinued immediately and proceeded voluntarily to make payments to those persons who had trained or "posted" without compensation. Defendant avers that its practice at Chattanooga, carried on by subordinates without knowledge of its Management or even of its Superintendent for the Chattanooga Division, has been changed and that no injunction to restrain future violations is either necessary or justified.

IV.

Further answering Paragraph V, defendant avers that for the purposes of training applicants for employment as firemen, brakemen and switchmen, the facts with respect to defendant's past and present practices are as follows:

Answer

It is the practice of defendant and of railroads generally, to require that all applicants for employment as firemen, brakemen and switchmen in yard or road service shall first undergo a training period to learn the duties and activities of the position they seek. Except as hereinafter explained, no compensation has been paid to such trainees, who are usually called "cubs." In the case of such trainees there is no school or other institution in which training for such occupation can be had and obtained. The training of such applicants is for the safety of the men themselves, for the safety of the public, for the protection of life and property and to teach trainees to meet the standards of safety and knowledge required in the operation of a railroad, thereby making it possible for them to become employees.

Trainees are applicants for employment and are licensed and admitted upon the trains and premises of defendant for the purpose of learning the duties and activities of the respective occupations for which they have applied for employment. Prior to December 1, 1943, such trainees were expressly informed they would not be compensated and were not employees; from and after December 1, 1943, such trainees were informed that they would be compensated as set forth in Paragraph V hereof.

The training period of these trainees is brief and the number of trainees in relation to the number of persons employed in the respective occupations is quite small. The average time from beginning of training until qualification is approximately 21 days for persons seeking employment as firemen or brakemen in road service and less than one week for persons seeking employment as firemen or switchmen in yard service. The length of training period depends entirely upon the aptitude, ability, prior experience and industry of the trainee himself. Defendant requires no set period.

Trainees are assigned to train with experienced and paid crews in road service consisting of an engineer, fireman, conductor, and at least two brakemen or in switching service consisting of a conductor (or foreman), two switch-

men, an engineer and fireman. The trainee learns by observation and at his option by performing the manual or physical work which he will be required to do upon becoming a regular employee. Such training is done under the supervision of the members of the crew performing the character of work in which the trainee is being instructed. The time of trainees is spent in observation and in receiving instructions. The Trainee is placed in a position where he can learn by precept and example. He has no duty and no responsibility. The regular crew have the duty and responsibility. The trainees represent additional men over and above the normal complement of a crew which is required despite the presence of trainees. Defendant does not receive any productive work from such trainees. Any manual activity of trainees is in the course of instruction, for which activity defendant has and does compensate the regular crew and which the trainee does as a volunteer student for the purpose of learning under the direction of employees paid to do the same.

Trainees are assigned no regular time at which to report for training or hours in which to carry out the training routine. The general practice is for the trainee to report at the beginning of a shift to a particular crew, to exhibit his permit to receive instructions and to receive his training. The trainee is free to select such time each day as best suits his convenience.

Before the trainee can qualify as an employee it is necessary for him to pass an examination concerning the rules and regulations of defendant with respect to the operation of trains and switching movements. After evidencing his ability to do the work and passing the required examination the trainee becomes qualified for employment and entitled to the full contractual wage rate of the position for which he has qualified, which compensation is far in excess of the requirements of the Fair Labor Standards Act. When trainees qualify and are accepted for employment they receive the same compensation as experienced and skilled employees doing the same work, although their training and skill is only rudimentary and many months

of experience are required to develop such individuals as skilled and efficient employees.

Defendant has never considered such trainees to be employees until after the training period has been completed and until the trainee has qualified to begin his first day's assignment. Under defendant's practices and under its labor agreements the trainee has no status as an employee and does not go on the seniority list as an employee until after the training period has been completed. The training practice followed by defendant is one of long standing custom in the railroad industry and has been followed generally throughout the United States for many years. Such training practice is conducted in good faith, the attendance of the trainees is voluntary, the trainees perform no productive work in the course of training and the training fits the trainees for a new, different and additional skill.

V.

The foregoing statement discloses defendant's practices as to trainees prior to December 1, 1943, and is defendant's present practice except as now explained.

The number of trainees in relation to the number of employees has always been small and has never been larger than the number who it was reasonably anticipated might be employed in the immediate future following their qualification. When the manpower shortage threatened to become acute due to the war, it was recognized that an additional incentive to trainees might help to increase the number of them and thus to alleviate a threatened shortage of railroad employees in train service. A joint committee of labor representatives and of railroad executives had been created to consider the manpower problem and to make recommendations. One of its recommendations made in 1943 was that as an aid to obtain necessary manpower the railroads should consider making payment "to men during pre-employment training periods."

In November 1943, defendant adopted the recommended practice effective December 1, 1943, of paying trainees the

sum of $5.00 per day for each day spent in training. This was done at a time when the men available for training were in nearly all cases married men with families or other dependents. Despite the attractiveness of prospective lucrative employment such men with dependents often could not afford a limited period of training without income unless their expenses in whole or in part were defrayed while training. Trainees were informed that these incentive payments were not to be made if they started the training period and then voluntarily abandoned it to accept employment elsewhere or otherwise. In some instances trainees since December 1, 1943, have abandoned such training and have not received the payment of $5.00 per day through no fault of defendant. In the majority of cases since December 1, 1943, trainees have received $5.00 per day for each day of their training period.

VI.

Defendant admits the allegations in Paragraph VI of the Complaint.

VII.

Defendant denies the allegations of Paragraphs VII, VIII and IX of the Complaint and for further answer thereto refers to the matters set forth hereinabove.

Wherefore, defendant, having fully answered the Complaint, prays that the same be dismissed at plaintiff's cost.

/s/ WM. H. SWIGGART,
/s/ WALTON WHITWELL,
/s/ EDWIN F. HUNT,
930 Broad Street,
Nashville, Tennessee,
Attorneys for Defendant.

I hereby certify that on January 8, 1945, I deposited in the Unted States mail at Nashville an envelope properly sealed and stamped addressed to Hon. Jeter S. Ray, Regional Attorney, Wage and Hour Division, Medical Arts Building, Nashville, Tennessee, which contained a true and complete copy of the foregoing answer.

COURT CAPTION.

January 22, 1945,
Being the Fourth Monday of January, 1945.

Be It Remembered, That at a District Court of the United States Begun and Held for the Nashville Division of the Middle District of Tennessee at the Federal Court Room in the City of Nashville, Tennessee, Within Said District and the Sixth Circuit, on the Fourth Monday, It Being the 22nd Day of January, 1945, Court Met Pursuant to Adjournment. Present and Presiding the Honorable Elmer D. Davies, United States District Judge for the Middle District of Tennessee, When the Following Proceedings Were Had, To-wit:

PRE-TRIAL DEPOSITION OF JOHN HARRISON WHITTEN, GENERAL YARD MASTER.

Depositions of witnesses tal n on behalf of plaintiff on the 8th and 9th days of May, 1945, beginning at 10:20 o'clock in the forenoon at the offices of Spurlock & Spear in Chattanooga, Hamilton County, Tennessee, before Joe Hunter, Notary Public in and for Hamilton County, Tennessee, pursuant to the Federal Rules of Civil Procedure, by agreement of the parties in the above-styled cause: present, Walton Whitwell, Esquire, and J. E. Hill, Esquire, counsel for defendant, and George W. Jansen, Esquire, and Paul M. Cadra, Esquire, of counsel for plaintiff; by consent of the parties the same was taken in shorthand and transcribed by Francis J. McSwiggan, Court Reporter.

Mr. Whitwell: All formalities and technicalities waived except that both parties reserve the right to make such objections to depositions as would be available in court.

Mr Jansen: That is correct; the parties waive the signing of the depositions by the witnesses and agree that the Notary Public need not be present during the examination.

The first witness, JOHN HARRISON WHITTEN, after being duly sworn, testified as follows:

Direct Examination,

By Mr. Cadra:

Q. State you full name, Mr. Whitten.

A. John Harrison Whitten.

Q. Where do you live?

A. 2202 Vance Avenue, Chattanooga.

Q. You are presently employed by the N. C. & St. L. Railway?

A. That's right.

Q. In what capacity?

A. General yard master.

Q. How long have you been employed by the N. C. & St. L.?

A. Twenty-nine years.

Q. What are your general duties as a general yard master?

A. The duties are such that I have jurisdiction over the Chattanooga terminals.

Q. Are you also responsible for the hiring of new employees?

A. Yes, I hire all the switching crews.

Q. Any other class of crews that you hire?

A. That is about the only one that I would hire.

Q. Do you also have occasion to dismiss employees, switching employees, if that becomes necessary?

A. Yes.

Q. When a prospective employee applies to you for a position as a switchman, what is the general procedure through which you go; in other words, do you have him file an application?

A. Yes, we have an application filled and we get his reference from whoever he gives us his reference, and if his references are good from his former employers, we then send him to the doctors for a physical examination and if he passes the examination all right, we put him to cubbing with the regular crews until such time as he is

able to take a job as switching or whatever job he is applying for, which in this case would be switching.

Q. Mr. Whitten, I hand you herewith a form which is entitled, Form 284 revised 7-19-29, and I ask you to tell me whether that is the form of application which you now use, or if it isn't the application now used, tell when you used it.

A. Yes, this is the form that we are using; this is the one form which we have been using.

Q. Mr. Whitten, I hand you herewith another form which is entitled Form 284 revised 10-1-43, and ask you to look it over and tell me whether you have ever used this form, and if so, when.

A. This form was put out to be used several months ago, I don't remember the exact date on it, but due to the prospective employees, they would not fill them out; we would give them these forms to fill out and that is the last we would see of them. They would not fill them out and bring them back; there was so much to it that they would not go through the rigmarole of filling out these forms. In a number of cases we would give them to the employees to fill them out and that is the last we would see of him or the form either. We have never had those returned properly filled out.

Q. Mr. Whitten, do I understand you to say you are presently using the form which is dated July 19, 1929, rather than the form which is dated October 1, 1943?

A. That's right.

Q. Will you introduce the form 284 revised, dated July 19, 1929, as Exhibit No. 1 to your deposition?

A. Yes.

Q. Will you introduce in evidence the form 284 revised October 1, 1943, as Exhibit No. 2 to your testimony?

A. Yes.

Q. You state that upon an employee filing the application he is referred to a doctor for a physical examination?

A. That's right.

Q. Is he charged a fee for that?

A. I suppose so.

Q. Do you know how much he is charged?

A. It is two dollars, I believe; I am not positive.

Q. Is the employee reimbursed, or the applicant reimbursed for the two dollars?

A. I couldn't say whether he is or not.

Q. Does the applicant at the time he is examined by the doctor also have to take some vaccination shots?

A. Well, I couldn't say what the outcome of the doctor's examination would be.

Q. Does the company require the applicant to not only undergo a physical examination, but also to take some vaccination of any type?

A. Well, we require an examination and I don't know what the doctor requires of him after he leaves us. We just send him to the doctors for an examination to see if he is physically fit to stand the job he is trying to get.

Q. Does the applicant bring the doctor's form back to you, Mr. Whitten?

A. In some cases he does.

Q. And in other cases, what happens to it?

A. They mail them in; sometimes the doctors mail them in.

Q. After this doctor's statement is received by you, do you speak further to the applicant?

A. How is that?

Q. After you receive this doctor's report, do you speak further to the applicant for the position?

A. Yes.

Q. At that time or at any other time, have you given the applicant prior to undertaking this so-called cubbing, any form of a written permit or authority to be on the premises of the company?

A. Well, we did not give him a written permit, but we did give the crew that he was to cub with oral instructions as to this man when cubbing and also this foreman that he would be working with would give him a card of some description stating that he had cubbed with him on a certain date.

Q. In other words, however, the employee himself has never been furnished with any written permit of one type or another?

A. Not until recently.

Q. And about how recently has the change been made?

A. Well, it has not been so long ago, in the last few months; I don't know just exactly the date of it; it was in the last few months that we have been giving written forms.

Q. Has that been since January 1, 1945, say?

A. I believe it was the latter part of last year, 1944, I believe; I am not positive of the date of it.

Q. You recall I was in your office, Mr. Whitten, about ten days ago?

A. Yes.

Q. At that time you had occasion to check as to the time when these new written permits first began to be used?

A. Yes.

Q. At that time, do you know what was the earliest permit that you were able to produce?

A. Well, I don't remember off-hand; as I told you at the time, there had been several of the boys that had had these permits, that had got lost and were never turned in; they had misplaced them and did not turn them back into the office.

Q. Can you give us any more definite idea as to when the written permit was first put to use?

A. I couldn't say any definite date on it because we didn't make any record of the definite time that we did start to give them the written permit.

Q. Now, at that time that the applicant speaks to you after completing the physical examination, is he given any other books, instructions, or anything?

A. Yes; I take each man and talk with him and tell him what he is going to be up against on the extra board; when he goes to work he will be put on the extra board, and I explain to them thoroughly that part of his work will be at night, part on the first shift, part on the third shift, and if conditions slows up the operations so that we have to reduce our forces, that the youngest men put on the extra board will be the first ones who will have their job cut off, in other words, on the reduction of forces. I explain to them the hardships that we have with weather, that we have to operate twenty-four hours a day and he will have to supply himself with plenty of good rainclothes and be

prepared to take the weather at all times, because we cannot stop the operations due to snow, rain, sleet or sunshine, and I explain to them clearly the conditions that we work under and give them the whole lay-out of the operations and the different jobs that we have, and he will not be on any one particular job at all. He just catches what extra work is open, and we take them in seniority order, first in and first out on the extra board.

Q. At that time, Mr. Whitten, do you tell the applicant, or we will call him a cub, or trainee or employee, whatever the proper term may be, do you tell the fellow when to report for the first day's cubbing?

A. Yes, we tell him to report on the first shift and we leave him instructions with what crew, and introduce him to the crew on the first shift and he will be assigned to an engine number with a certain crew on his first day, and each succeeding day while he is cubbing.

Q. In other words, each succeeding day he is assigned to a different crew?

A. That's right, another engine each time; we rotate them around to another job. We have twenty-one jobs and we try to get them to get acquainted with all the jobs. It is impossible for a new man to get the idea of the whole lay-out while working one job, and our system is, when we get a new man without any experience in railroading at all, he is practically helpless, he is a handicap to the work, and if it wasn't for the older men that we have on the jobs we would have been in a heck of a shape during the last few years with all the war material which we have to handle.

Q. Mr. Whitten, you make these verbal assignments from day to day, if I understand your answer correctly?

A. That's right; we give him instructions when he comes to work in the morning; if I am not there, I leave word with the yard master on duty what job to put him with.

Q. Sometimes, are these assignments to crews made the previous evening?

A. Occasionally they are; part of the time they are when they know that he is—when he leaves in the afternoon when he completes his first tour of duty of cubbing, he will

be told then in the morning to go with engine number so and so.

Q. You say that you have various shifts in the yard; could you call off the shifts and the hours?

A. We have seven shifts, seven jobs, in other words, make it jobs, that goes to work on the first shift; the hours are from six-thirty to two-thirty. We have seven jobs that go to work at two-thirty until ten-thirty P. M. We have seven jobs that go to work from ten-thirty P. M., to six-thirty A. M. the next morning.

Q. When you start a man to cubbing, to which shift do you assign him at first?

A. We always start him on the first shift, and if it is not daylight, if it is in the wintertime and it is not daylight when it is time for him to start cubbing, I tell him to get on the engine and ride with it until daylight and not attempt to do anything at all until it is daylight, until he can see what he is doing, for it is too dangerous.

Q. How long do you keep a cub switchman on the first shift generally?

A. We usually run him on four or five jobs on the first shift.

Q. How many days—

A. It depends on how quick he is to pick up the work.

Q. How many days do you keep him on the first shift?

A. From four to five as the usual thing.

Q. Then to what shift do you transfer him?

A. Then we put him on the second shift, from ten-thirty to two-thirty.

Q. How long do you keep him on that shift?

A. It varies on the ability of the man to pick up the work.

Q. What would be a general average?

A. Around three to four days.

Q. Then what shift, if any?

A. Then we put him on the third shift.

Q. How long do you keep him on the third shift?

A. That is from ten-thirty to six-thirty in the morning. We usually keep him on there three or four days, depending on his ability to pick up the work.

Testimony of John Harrison Whitten

Q. Mr. Whitten, you referred to seven different jobs on the first shift; I wonder if you could explain that a little more; what are those seven jobs?

A. Well, the seven jobs are seven switch engines assigned to different parts of the yard work. The first job we have reference to is what is known as the south end of the yard; number two job would be the north end of the yard; number three job would be in the city yard; number four job would be in Alton Park; number five job would be in the tannery flats; and the other two jobs would be what we call roustabout jobs, they go anywhere and everywhere.

Q. You stated there are seven jobs on the second shift; what jobs are they?

A. They compare to the same thing on each shift. The same engines work right through twenty-four hours a day; there is a little bit of variation in the duties in some of the second shift, but not a great deal.

Q. Which one of these seven jobs do you assign the cub to?

A. We usually put him on the south end of the yard at six-thirty A. M., the first job he works.

Q. And the second job?

A. The north end of the yard.

Q. And the third job you assign him to?

A. The Alton Park job is usually the next job.

Q. And the next job?

A. In the city yard.

Q. And then the next job?

A. In the tannery flats job.

Q. And the last two would be which jobs?

A. The roustabout jobs.

Q. How does the work which is performed on these several different jobs differ?

A. Well, on the south end of the yard, that job is breaking up and making up trains practically the entire tour of duty; that includes all trains on the southbound moves, and on the next job which is called the north end job, that is breaking up and building trains going north. Those two jobs are comparatively the same kind of work with

the exceptions of the track lay-out is different from one yard to the other, and the Alton Park job is all switching industry work, and the tannery flats job is all industry work. In the city yard job, their work includes industry work and switching of passenger trains, freight houses, team tracks; and the other two jobs was what we call roustabout jobs; they are making deliveries from our yard to the connecting lines here, or any odd job that comes up during the hours they are on duty.

Q. Can you state briefly and rather fully at the same time, Mr. Whitten, what physical activities a switchman at Cravens Yard engages in?

A. Well, he has to know the tracks that he is going to; when they come off a train with a cut-off car to switch up, he knows what signals are to be given to go to what track with so many cars, what other cars go to different tracks, classifying the cars that come out of this train, throwing switches, cutting off cars, giving signals to the engineer what move is desired.

Q. How does the physical work which the switchman engages in, differ in these seven different jobs, if any?

A. Well, there is quite a difference in part of the jobs. Now, in the north end job, the job would be practically the same kind of operation as the one on the south end of the yard. When he goes to Alton Park, the territory in that part of the town is very irregular. He has got hills and grades there to go up and down. They have to wind up the brakes in the cars to hold them, to keep them underway on the hills if they leave them. There is very much difference in the work there than there is in the yard. That is spotting cars for the different industries to load and unload and the work is considerably different from the trainyard work.

Q. Does not all this work involve much the same sort of physical activity, I mean switching cars, coupling cars, coupling the air hose, cutting cars, setting handbrakes?

A. Yes, they would have to, of course, naturally throw the switches to get in on the different tracks and they would have to cut off the cars as they leave, but as a rule the difference in the two jobs is, in the yard they would cut the cars off rolling, and in the industries they

would stop. In each case they cut the cars off and come out, throw the switches and get back to their main lead, or, in other words, in the yard, our yard is almost level. If they have got room they start the car rolling about three or four miles an hour and give the man a signal how many cars that he wants him to cut off and he will cut off three or four cars and they will roll on the track in the clear; but on the industry work you cannot kick cars, due to the hazards of tearing up other property around the industries, and on grades where they would not stop, they naturally have to go in and stop the train and separate the air hose and separate the couplers and set up the hand brakes.

Q. What is the purpose of having these fellows cub in all these various different locations that I have mentioned?

A. That is to tell what he is to do when he goes there and to find out where the connections are, find out how to get the different industries and find out the hazards of the work in case he gets to these places at night. A man that hasn't cubbed in these places that goes to them at night would be in an awful bad position; he would be lost and get himself hurt or somebody else hurt. We, therefore, have to insist on him going to these places, tight places and industry work during the daytime so that when he does get on the board he has some idea about where he is going. To take a man that has never been over the territory and put him out there, why he would be in the way. As one foreman told me a while back, he says, "leave him here; I will do the work by myself. He will just be in the way."

Q. Mr. Whitten, how long would it take a switchman, a new man, to learn to throw a switch?

A. It wouldn't take him but a short time to learn how to throw a switch open.

Q. Would you put it in minutes?

A. I would say about two minutes.

Q. How long would it take a new man to learn to couple a car, couple an air hose?

A. It would not take over—; well, now, let me see, that would be a pretty hard proposition to state exactly

how long it would take him to learn that. He could be shown how and let him attempt it, and then he might not do it for several attempts. The knuckles have got to be adjusted on these couplers in attempting to couple cars. If a man doesn't have some knowledge of how they have to be set, why he would probably miss the couplings a number of times before he got the cars coupled.

Q. How long does it take to couple?

Mr. Whitwell: Mr. Cadra, you are not insisting that there is just only one switch in the yard in Chattanooga?

Mr. Cadra: No, Mr. Whitwell, I have no doubt there are many.

Q. Incidentally, how many switches are there in Cravens?

A. I don't know the exact number, but I guess there would be something like two hundred and fifty or three hundred switches, maybe more.

Q. Are they all operated by hand?

A. No, not all of them.

Q. About what number are operated by hand?

A. We have what we call interlocking plants getting in and out of the yard over the main line; they are operated by a leverman in the tower. There would be, let me see, about six switches at each end of the yard that is throwed by the tower man when you come off the main end of the line into the switching unit.

Q. About how many hand-thrown switches are there?

A. There would be in the neighborhood of two hundred and fifty or three hundred; I haven't got an exact count of them.

Q. Does the physical work in the throwing of a switch in one location differ in any way from throwing a switch in another location by hand?

A. The switches are all thrown in the same way.

Q. Getting back to the coupling of the cars, how long would it take a switchman to couple a car and put the air hose together?

A. If he knows what he is doing and adjusts the knuckles right before the car hit, why it doesn't take any time to couple them up at all scarcely. If he has got the knuckles adjusted right before they come in and lock,

all they have to do is roll into them and they will adjust themselves if the knuckles are right.

Q. In other words, it takes less than a minute?

A. That wouldn't take any time at all if they are adjusted right. If you understand, when a car is uncoupled from the other one, why that knuckle opens up and automatically stay open, and when he goes to couple this car into the next one, a number of times that knuckle is set there just right to couple up without any operation at all.

Q. About how many times would a fellow, if he were practicing time after time, I mean continuously, about how many such couplings would he have to make before he got on to the trick of making couplings?

A. That would vary considerably for the conditions are not the same anywhere in the terminal; now, on a curve they have got to be adjusted one way or the other. A curve in one direction and a curve in another direction would have to be adjusted in different ways, and on a hill they would have to be adjusted probably a different way than that, and the curves are not the same degrees of curves, and the place of the coupling varies from straight track to the slack curves, to stiff curves, and it would take a man a considerable time to get it in his head how to adjust these knuckles on the different locations where he is going to make a coupling, and there would be no set rule to state how long it takes a man to make that coupling. I have seen times that they couldn't hardly couple a car on the curve and had to push them off the curve before they could get them coupled.

Q. How about cutting a car; how long would it take a man to learn to cut a car?

A. It would not take long to learn to cut off one car, but if he undertakes to cut off the cars as are directed by his foreman, he would he would have to know what he was doing and what the signals were and how many to cut off, but as far as pulling the lever to cut the cars off, it would not take long to learn that in the different places that he is in.

Q. Do you require all applicants for switchman jobs to undergo this so-called cubbing period?

A. Yes, we would have to, having a man without any experience in our yard or any knowledge about the tracks, he couldn't get anywhere. He would be useless if he was to go out there with a switch engine and the foreman tells him to bring his engine to track No. 10, he wouldn't know where No. 10 was any more than you would know where Hitler is today.

Q. In other words, an applicant may know all the physical work which is involved by himself, but that is not sufficient for your purposes; he has to learn the yard?

A. He has got to learn the tracks and how to get to them, how to get to the cross-overs, how to get to the main line, how to get to the shop, how to get to the repair track, learn how to get to the scale track, learn where the hold tracks are, learn where the classification tracks are, know where the train-head tracks are, and know what switch to throw when he is going to one of these tracks. Now, as far as throwing a switch, anybody could go out there and throw a switch over, but whether he is throwing the right one or not, he has got to know these switches, which switch is which and what track he is going to when he is given a signal to come to a certain track with a car on his engine.

Q. Would you therefore state that the primary purpose of cubbing these applicants is that they may learn the yard, rather than the physical work involved?

A. Well, that would be the biggest part of the duties, is to learn what to do and when. There is more to railroading than the physical work. It wouldn't be so hard to get it if you know what to do at the right time and when to do it.

Q. Have you ever observed these people cubbing, Mr. Whitten?

A. Yes, I watch them practically all the time when I get a chance; I watch their actions to see what actions they are taking, and I instruct them right on the safe way to do certain jobs and the safe conditions they can get themselves in.

Q. How do these so-called cubs spend their cubbing day?

A. Well, they usually get with the foreman that—the

crew that we assign them with. What we call a crew is a foreman and two helpers. The foreman has charge of the engine car and we put this man with what we call the footboard man on this engine. Now, we have the foreman and what we call a field man, and a footboard man. Now, there is also a difference in the jobs there; the field man goes down in the yard and lines up the switches; he knows where the cars are going; he has got to check these cars and know where they are going to. He goes off maybe a half a mile from this engine, lining switches up with different tracks where he wants this to be switched. The footboard man stays with the engine, or close to the engine, and when they pull up over a switch to switch up different cut cars, the foreman is standing between the two men; he will give this footboard man a signal how many cars he wants cut off, and he will cut one, two, three cars, whatever he wants to cut off, to go to a certain track, and he will give a signal if there is anyone there, to keep it set until those cars roll in the clear and the foreman will give him a signal if there is anyone there, to be sure and cut off as many cars as he wants to go to the next track.

Well, now then when they put these cubs out with this man, we tell him to watch what they are doing, stand out there if necessary and watch what they are doing, not to attempt to do anything, see what the operation looks like, get on the engine and ride, speak with them and throw that switch and come back to the train, see if he can couple it up. The footboard man rides with him all the time; he will stand on the footboard with him and show him how they have to be coupled, what position he has got a drawhead in to make the coupling. Then he will show this man what a back-up signal means. The engine will back up with this cut-off car; the regular man knows where he is going; he gets up to switch the number to the other track where he swings off, and the engine pulls these cars over the switch; he will give the engineer a signal to stop. He will throw the switch and the foreman will again proceed to give him signals on how many cars he wants cut off and the man in the field is clearing tracks for the cars to go to. Now, he takes

this cub with him and takes him along and lets him ride on this engine and shows him what there is to do, and shows him and tells him what the signals mean, but he won't let him give signals until he is out there for some time, as he could give possibly give wrong signals and get somebody hurt. He will eventually tell this boy, "Now you throw that switch when we get over it".

Q. Do they let cubs throw switches the first day?

A. Yes, if they are in position that they can. Now, if they have got a little spare time and it won't interfere with their work, they will show him and tell him to throw that switch. They will stop and tell him to throw that switch. Most of them have got a little latch; you raise the latch up and throw the switch over.

Q. They let him couple and uncouple cars the first day he is cubbing?

A. Yes, they let him cut off some cars, but being easy with him. They will let him pull the levers, telling him which lever to pull, how to stand and how to run alongside of the car if the car is in motion, and show him how to stand.

Q. Do these so-called cubs cub a full shift generally?

A. Yes, they usually cub a full shift.

Q. They do that always, do they not?

A. Yes, they are supposed to cub out their full shift.

Q. Sometimes they will cub two shifts a day, will they not?

A. Well, they may cub over on another shift for four and one-half hours, or something like that, twelve and one-half hours a day, as like most of them say, the sooner I can get through. At their request lots of times we let them double over to what we call the second shift for four and one-half hours.

Q. Mr. Whitten, do you ever use a cub to do the work of a regular switchman while he is still cubbing?

A. I believe we have in one case that I recall, that our men laid out sick and we couldn't get the work done, and we had a man cubbing that had been there for, I believe, four or five days and we had to put him in service on one occasion; that is the only one that I recall.

Q. May there have been other occasions?

A. I don't recall of any other occasion, only one that I recall.

Q. Did he continue to cub after having worked as a regular switchman during that one day?

A. Yes, he cubbed on for a few days longer, and I believe it was at his request, that he didn't feel like he was capable of taking his part until he had a little more experience.

Q. To what man are you referring now, Mr. Whitten?

A. I don't remember his name; I don't remember what his name was.

Q. Is he still employed by the N. C. & St. L.?

A. I would have to look at the records; I forgot what his name was; I don't know whether he is or not.

Q. How long does it generally take a switchman to complete his cubbing period?

A. It depends on the man; some of them will never learn the work and some of them pick it up in six or eight days, some of them ten or twelve days, and some of them just come in and say that they can't learn the work and quit and walk off.

Q. Have you ever let anybody go because seemingly he could not qualify for the switchman job?

A. No, they just quit on their own account; they couldn't learn the work and don't like it, and walk off.

Q. Well, how long would you keep a man down there cubbing if he wanted to, when it appeared to you that he was not qualified?

A. Well, we usually—; how is that now?

Q. How long would you keep a man cubbing after you thought that he would not be able to meet your qualifications?

A. Well, if I saw that he wasn't going to make it at all, I would ask him about it and ask him if he thought he was going to learn the job, but I don't recall ever taking one off and telling him he wasn't going to learn. We give them all the chance in the world to learn the job, too much. There has been a lot of cases, they just come in voluntarily and tell us, "I don't believe I am going to like this work; I don't believe I am going to be able to learn this job," and they are gone.

Q. Do these cub switchmen have any papers which are required to be signed by the foreman or any members of the train crews?

A. Yes, we have a form that we give them, a printed form that we are furnishing them now, and previous to this printed form, we had the foreman to either verbally, or give him a card stating that he cubbed with him.

Q. Now, this printed form you are referring to, that is the same form which you stated previously had been put in effect only recently, I forget just how far back you said.

A. Yes, that's right.

Q. Prior thereto, were the cubs required to obtain any signatures?

A. Yes, we required the foreman to okay him by his signature.

Q. Do you have any such forms in your office?

A. I don't believe that we have; I don't know whether we have got any of them left or not. Usually we have a whole lot of little cards about that long and about so wide, whenever you cub a man, his name is on that card and you give it to him and he brings it in and lays it down, and I don't know whether they have all been taken care of, or whether any of them have been taken care of or not.

Q. Well, as a matter of fact, isn't it so, Mr. Whitten, that you would decide whether to put a man on the extra board simply by speaking to the foreman without having the cub or anyone else give you any written statement?

A. Well, not necessarily, they would practically all get these cards or a piece of paper with the foreman's name on it and then on top of that, I would personally ask the foreman if he thought this man knew enough about it to take a man's part before we put him to work, and if he told me no, why I would let him cub some more until he would be qualified to handle the job when he was put on it.

Q. Are the cubs prior to being put on the extra board required to pass any written examination?

A. Not necessarily, no.

Q. What do you mean, not necessarily, no.

A. Well, we have our past practice in our yards that we can work these men and then get a class when we get a number of them coming up and have them all attend at the same time, that is on operating rules, but now then on the yard rules and our simple rules around there and doing the work, the foreman they are working with teaches it to them and he asks them when he gets through, he asks them, "Now, do you know these signals and these rules around the yard here?" I will ask them what they think about themselves handling their jobs before we let them go to work, but as far as the general writing of the rules, we just hold class usually about once a year and get all the new employees in on that one examination.

Q. In other words, prior to being put on the extra board, generally a cub does not have to pass any written or oral examination?

A. Well,—I would say the written—now, we do orally ask them questions about the rules, I do myself, and the men they are working with will. For instance, a foreman —now, I might state in there that they are all old men on this first shift, that practically every man there down there that is running a crew has been in there for a number of years and of course they know the rules from A to Z and they teach these boys the rules as they go along of all the operations necessary in the yard and of course our main line rules would not all have a bearing on a yard crew; there is some rules that he knows, the main line rules, but there isn't as much of it as there is in the general rules. The yard man is not required to keep up with all the rules that the main-line men are. There are just certain rules in the yard that they have got to familiarize themselves with.

Q. If you are in great need of switchmen, as you are at times, you will cut down the cubbing length that a fellow has to cub, will you not?

A. Well, if we think that he can get by with the job and we have cubbed men now a very short space of time, but these men have had experience in switching in other yards; when a man gets the principles of switching, all in the world he has got to learn is the yard that he is in, how to get to the different places and as far as learning

the switching is concerned, he knows the switching end of it, but it is the lay-out that he does not know. We can put a man on a job like that where he knows the principles of switching and we can let him go over the terminals and in two or three days put him to work, for he knows the principles of switching, he knows the rules, he knows what has to be done, but all he doesn't know is the lay-out of the yards.

Q. As a matter of fact, these experienced switchmen come from other yards or roads and they cub seven or eight days, do they not, generally?

A. How is that now?

Q. They cub generally about seven or eight days?

A. No, not in all cases; I just stated that if we had an experienced man there in some other yard and we put him on there, we possibly would not cub him but two or three or four days if we was in bad shape for men, but if we had plenty of men at the time and his services were not needed right off the bat, why we would let him cub three or four, five or six days or seven days, depending on the circumstances at the time he was doing his cubbing.

Q. Prior to December 1, 1943, were these cubs paid any compensation for the time spent in cubbing?

A. I don't think so.

Q. Have they been paid anything since that time?

A. Well, they have been given five dollars a day to try to get them to work.

Q. If they did not complete their cubbing, were they paid the five dollars that you know of?

A. I couldn't say whether they were paid that or not.

Q. When you employed them did you tell them anything about whether or not they would be paid five dollars while cubbing?

A. Yes, we tell them it now, "We give you five dollars a day while you are cubbing the job if you stay with it, but if you don't stay with it, you will not be given five dollars a day for your time here."

Q. Have you received any other instructions very recently?

A. No, not recently.

Q. If a man applied to you today, you would advise him that he would be paid five dollars a day for cubbing, but if he did not complete his cubbing he would not be paid any compensation whatsoever, is that correct?

A. Yes, I would tell him that is what we do, the deal we make with him. We try to get him to stay on the job when we put him on there; there is so many of them that come in and cub a day or two and we never see them the next morning. We try to induce them to stay with it when we put them on and try to get them on.

Q. Now, you stated that prior to December 1, 1943, the cubs were not paid any compensation whatsoever; what is the reason for paying the cubs the five dollars at this time?

A. Well, we could not get men; the army began to take our men out and we could not get them to come down there and cub a job for nothing. Most of the men we had to go to hiring were the older men and practically all the older men have got families and they couldn't agree to come down there and cub on the job for days without something; they could get jobs other places.

Q. In other words, is this payment being made because of the present war emergency?

A. Well, I should say it is that we can't get men to work; we induce them to come down and take the job; we give them five dollars a day to help them along until they do get the work.

Q. Prior to December 1, 1943, do you have any records that you know of, Mr. Whitten, which would show the number of days that the cubs cubbed prior to being placed on the extra board?

A. No, I don't believe we have got complete records on that for the simple fact that we have been up against it so tight for clerical help as well as supervisory forces, that our records have not been kept up to date.

Q. I see you have here a large book; what do you call this book, Mr. Whitten?

A. Well, I suppose you would call that the record of the employees.

Q. Mr. Whitten, could you locate the name of Mr. James D. Nave in this book and state what the book

shows as to the number of hours or days that Mr. Nave cubbed.

A. This record does not show how many days he cubbed.

Q. What does it show in reference to any matter which might be pertinent in determining the number of days he cubbed?

A. It just shows the time that he was added to the extra board, which was January 23, 1943.

Q. Does it show the date when he first applied for work or passed the initial physical examination?

A. He passed the physical examination December 29, 1942.

Q. Do you have any other records which would show either the hours or days which persons have spent cubbing prior to say, December 1, 1943?

A. Not that I recall.

Q. Is that a fairly typical entry in the sole records you have kept on the cubs prior to December 1, 1943?

A. Well, as I stated before, that our clerical help was turning so fast that it was impossible to keep all the records as they should be; they were not kept up to date due to the shortage of help.

Q. Mr. Whitten, do you happen to know whether at this time the N. C. & St. L. is deducting railroad retirement from these five dollars a day payments?

A. No, I don't know whether they are or not.

Q. Since December 1, 1943, what records if any have you kept on the time which these people have spent cubbing?

A. Well, we have tried to keep them up in better order since that time and I think that most of them are pretty well up to date since the first of 1944.

Q. Referring to the book again, will that show the number of hours which an employee spent cubbing or will it merely show the number of days which an employee spent cubbing?

A. That is since 1944 you have reference to?

Q. Yes, since you started making the five dollar payment.

A. Well, their time ticket goes in, the foreman that he works with makes out a time ticket and sends it in and it

might be that he didn't have a complete record on each day that he would cub, for each foreman is supposed to make out a time ticket for his crew daily and send it to the auditors at Nashville.

Q. Do they send it directly, or through you?

A. Through our office; it comes through our office.

Q. You do not have any records here then of the hours which cubs have spent cubbing?

A. On most occasions we have; I say it could be possible that we might have missed some of it; we try to keep a record on all the hours that they would work. There is a possibility there of some of them being missed.

Q. Suppose that a person cubs two shifts in one day; would he be paid ten dollars or only five dollars?

A. We haven't let any of them cub two shifts that I know of; we have let them cub a shift and a half.

Q. Has that been only recently, since January 1, 1945?

A. It has just been a few occasions of this when they asked to get on the board as quick as possible and we let them work twelve and a half hours if they wanted to. That is optional with them.

Q. That is recently, since January 1, 1945, or do you mean to state that since this five dollar payment was inaugurated you let them cub not more than twelve and one-half hours?

A. That's right.

Q. What is your answer?

A. Yes, in a few cases they have asked permission to cub a little longer to learn their job quicker and we have let them cub as much as twelve and one-half hours.

Q. Have you since December 1, 1943 and December 1, 1944, allowed any persons to cub two full shifts in a day; I am not talking about what may have happened recently.

A. Not that I know of.

Q. If a cub spends twelve and one-half hours cubbing in any one day, is he paid more than the five dollars per day?

A. I don't know what the pay would be; the time tickets were turned in and I don't know what they pay him. The foreman, if he works eight hours with one man, he will

turn in a ticket for eight hours, and the next man will turn in a time ticket covering four and one-half hours, and I don't know what the pay is.

Q. Do you have the same system of paying the firemen if they complete their cubbing as when they fail to complete their cubbing?

A. I don't know what the ruling is with firemen; I have nothing to do with firemen; it is the engineer—

Q. Under whose jurisdiction—

A. It is under the master mechanic's.

Q. And what is his name?

A. C. C. Burton.

Q. Do they cub firemen, that you know?

A. I couldn't say.

Q. At Cravens Yard?

A. I couldn't say whether they do or not; I have nothing whatsoever to do with the mechanical department.

Q. You state that the train crew consists of a foreman, two switchmen, an engineer and what other employee?

A. Fireman.

Q. When persons are cubbing, under whose immediate jurisdiction are they cubbing?

A. The fireman and engineer are under the mechanical department.

Q. Speaking of switchmen.

A. Switchmen are under my department.

Q. And under whose jurisdiction would a cub therefore be while cubbing?

A. He would be under my jurisdiction, a switchman would.

Q. You would give him instructions as to what to do or what not to do?

A. The switchman you have reference to?

Q. Yes.

A. Well, I would take them to the crew and tell them that he was cubbing with them, and to give him all the information they could and show him all they could about the operations of the yard.

Q. Well, who on the crew, if anyone, tells him what to do?

A. The footboard man as I stated before, he would be placed with the footboard man with this crew and he would go with him practically the full time that he was with this crew and he would tell him the operation, what moves that he was going to make, tell him what they were going to do and how to do it and what the signals mean and what the targets all meant.

Q. Would he also tell him what switches to throw?

A. Yes, he would have to show him and tell him too, because he wouldn't know the number of the track; he would have to show him what switches to throw.

Q. He would tell him what cars to couple?

A. He would tell him what cars to uncouple; if they were going to couple up the cars, he could see the ones they were going to couple up; he wouldn't have to tell him that.

Mr. Cadra: That is all.

Mr. Whitwell: Let us adjourn until one o'clock.

(Luncheon recess.)

(At one o'clock by mutual agreement it was postponed until 9:00 A. M., May 9th.)

Cross-Examination,

By Mr. Whitwell:

Q. Mr. Whitten, what position do you hold with the N. C. & St. L. Railway?

A. General yard master.

Q. You are located in Chattanooga?

A. In Chattanooga.

Q. How long have you been general yard master?

A. I have been general yard master thirteen years.

Q. Do you as general yard master have jurisdiction over receiving applications for positions as switchmen?

A. I do.

Q. In the Chattanooga yard?

A. I do.

Q. Now, where a person makes an application for a posi-

tion as switchman, I take it that that is the first step he takes, isn't it?

A. Yes.

Q. He makes out and fills out a written application?

A. Yes.

Q. Now, when he fills out this application for the position of switchman, is it explained to him at the time he fills out the application that he is not at that time employed and that he has to go through a training period?

A. Yes, he is given to understand that we have to get his reference from his former employers as to his ability, his character and so on, and then it is explained to him that he will have to cub until he learns the work and it depends on him how soon he can get on the board, what we call our extra board.

Q. And by virtue of this application that he files, that carries with it no obligation of the company to hire him and it carries no obligation for him to accept employment, does it?

A. Not a bit in the world.

Q. Now, he goes through this pre-employment training period and sometime later he must pass an examination?

A. That's right.

Mr. Cadra: Mr. Whitwell, since Mr. Whitten is a company employee, I believe that we could get the information more accurately if the questions were not too leading.

Mr. Whitwell: Well, he is on cross-examination and you can ask leading questions on cross-examination.

Mr. Cadra: However, he is a company employee and as such an adverse witness.

Q. Mr. Whitten, prior to December 1, 1943, were cubs paid anything during their cubbing period?

A. Not that I know of.

Q. Now, beginning about December 1, 1943, is it or not true that the N. C. & St. L. inaugurated a plan of paying cub switchmen and cub firemen during their cubbing period five dollars a day as an incentive payment?

A. That's right; we couldn't get the men; they wouldn't work out the cubbing out period.

Q. Was that five dollars intended as wages or was it just a gift?

A. To get them to learn the job, an incentive to take on the job and try to learn it.

Q. And where a switchman cubbed in the yard here at Chattanooga, whether he cubbed six hours a day or ten hours a day he got the same compensation, that is the same five dollars, didn't he?

A. Yes, we allowed him five dollars regardless of his hours.

Q. Now, he received no contractual wage rate until after he had completed his cubbing and went on the roster of employees, is that right?

A. I didn't get that.

Mr. Cadra: I object to the form of the question.

The Witness: I didn't get that exactly right.

Q. I say, the cub doesn't receive any contractual wage rate until after he has completed his training period and goes on the roster of employees.

A. That's right, and after he completes his cubbing out and is considered capable of handling the job he has applied for, he is put on the full rate paid by the job.

Q. And when he does enter upon the roster of employees, he receives as I understand it the same contractual wage rate as regular employees who have been with the company a good many years.

A. That's right, he gets the standard rate; I believe it is $8.54 a day, right about there; that would be the same amount that men who have been there for thirty and forty years get.

Q. Does one of these cub switchmen, or cub for the position, does he have any status at all as an employee until after he has completed his training period and entered upon the roster of employees?

Mr. Cadra: I object to the form of the question.

Mr. Whitwell: You may answer.

The Witness; No, he is not considered an employee until we put him on the roster; he has no status at all, just learn-

ing, and if he learns the job all right and can contend with it, why he is put on the roster and his seniority starts from the day that we put him on the roster.

Q. Does his status while cubbing, is it covered by any labor agreement?

A. None that I know of.

Q. Is the railway obligated in any way to employ a cub, or is the cub under any obligation to accept employment?

A. Not that I know of.

Q. State whether or not the applicant's attendance as a cub is purely voluntary on his part.

A. Yes, they ask for permission to learn the job.

Q. When a trainee files his application, is he at that time advised that he will not receive any contractual wage until after he has completed his training period and entered upon the roster of employees?

A. He is; he is told when he is put on the roster that he will receive the full benefit of the salary that the job pays.

Q. Is it the practice of the N. C. & St. L., and also the railroads generally throughout the country, to require applicants to undergo a training period to learn the duties and activities of the position which they seek?

A. It would have to be for there is no new man that can come into any one yard that is not familiar with it and carry on the duties. It would be an impossibility.

Q. Is there any school where a person could attend and learn the duties of a switchman or fireman in the yards, or does he have to become actually acquainted with the physical lay-out of the yards?

A. Well, there is no school here close to Chattanooga that I know of, and even if he did attend a school, as I see it the schooling could not tell him the conditions that he would get up against in the different yards all over the United States. It would be absolutely necessary for him to get some idea and see the conditions where he was having to work before he would be capable of carrying on the duties at all.

Q. In other words, if I understand you correctly, even if there were a school, still the cub would have to learn the road and the switches and the signals and the prac-

tices of the company by actual training in the yards, wouldn't he?

A. He would have to have; he would be compelled to have some training in the yard regardless of his schooling.

Q. Mr. Whitten, give us some idea of the extent of the yards here in Chattanooga where cub switchmen or applicants are trained to become employees later, the extent of your yards.

A. Well, our yard limits extend from the far south of Alton Park, and the foot of Lookout Mountain, through the main part of the city and out to what is known as the Mellon Chair Company switch, which is on the south side of the town, and there is numerous switches and sidetracks all along every so often, and in this entire territory a man has to know where he is going and how he would get to these places, what route to take, what to look out for, the crossings that he has to contend with and the location numbers that the different industries go under. We do not designate an industry as its name; they are all numbers. Each industry has a number. He has to know the number of each industry and in what district they are located. We have the yards divided up into six districts and all industries that are in District No. 1 are numbered beginning with one hundred; all industries in District No. 2 begin with the numeral two hundred and so on up with all the districts and each industry has a location number and the cars are marked to location number and not to consignee. Well, if he did not know these location numbers, he would be lost in trying to get a car to a man's door, if he is not familiar with the location numbers and the district in which they went to. When a train arrives in the Cravens Yard, he may have twenty-five to thirty-five cars for Chattanooga industries. Our clerks will mark those cars before they are switched to the location that they are to go to and the foreman and his two helpers take a check of the train, switch these cars to each track that goes to the district that they are to go to. That is what we call classifying the cars of different districts, and if he did not know something about what track they classified the different districts on, he would be lost completely.

Q. Do you have some idea, Mr. Whitten, about approximately the number of cars that are switched here in the Chattanooga yard on any given day on an average?

A. We are averaging right now and have been for some time between twenty-five hundred and three thousand cars every twenty-four hours. That is going, coming and switching through the yards and industries in and out, delivering to connection and all, averaging about between twenty-five hundred and three thousand cars per day in switch moves.

Q. An applicant for a position as a switchman or fireman in the yards at Chattanooga, is it necessary that he become familiar with all these districts that you spoke of?

A. Yes, for he would be an extra man, he would be subject to work on any of these jobs at any time, day or night.

Q. Is it necessary that an applicant for a position as switchman or fireman must study the operating rules of the company and acquaint himself with the operating signals and fixed objects in the yards?

A. It is; he is given a rule book, a timetable and a signal book that he is instructed to study to learn the different signals and the general operations that he will be confronted with when he is put on the job.

Q. Is it necessary that he go through this training period for his own protection and the safety of himself and of the public and the safety of operations in the yard?

A. It is absolutely necessary; if he was turned loose—now, just for example, suppose we put three new men on an engine down there to operate that engine crew at night. There is one switch lead, there is nine switches in a row. At night they display a green signal on one side and a yellow signal on the other side, and should he come out there tonight and look down and see that row of green signals down there, he wouldn't have no idea in the world what they meant, what track they were lined up for, or whether he would run into somebody else or run through a switch and derail cars or sideswipe cars with other cars that he had hold of.

Q. I believe you estimated yesterday that there were approximately two hundred and fifty different switches in the Chattanooga yard.

A. Yes, and I run through my mind with them last night and I counted a little better than three hundred. Now, that is not accurate, but from running through the switches that I could recall, from one end of the yard to the other, there is a little better than three hundred switches.

Q. Mr. Whitten, I believe you said yesterday that this training period depends on the aptitude and the ability and the prior experience and the industry of the trainee himself, that there is no set period for training.

A. That is right, there is some men in that business that just like in any other business, that we have men that will pick up the work and learn it right off the bat, and they seem to be naturally born for a railroad man, and we have others that will cub on the job for days and can't seem to get it into their heads what is to be done. The biggest trouble we have with them is the signals; we have right in the Cravens Yard thirty-six tracks, each track is numbered and the crews in switching are not close enough together to tell the other one what he wants done. He automatically gives him a signal to where to come to and if a man didn't know the signals of all these thirty-six different tracks in the yard, he would be absolutely lost and would be useless and in the way until he learns the different signals for the different tracks. The whole operation is practically signals; as far as throwing the switch or uncoupling the cars, there is nothing to that only a little manual labor, but the main part of the whole operation is learning the signals and each track has a different signal and the foreman will give a signal back to the man that is near the engine and he is supposed to repeat that signal to the engineer of what track they want to come to, or what move they want to make. The engineer works strictly by signals and that is the main thing of the whole operation is the signal work. As I have stated, they are not close enough to tell one another what they want to do; with the noise and all it would be impossible to tell them. They have got to give signals and that is the main trouble of the new man is learning signals.

Q. Now, I believe you said that some of these trainees

qualified sooner than others and is it also true that some never qualify?

A. We have had several that cubbed for several days and volunteered and come in and told me that they didn't believe they would ever learn the work and give it up and not attempt to go any further with it. I know some years ago in particular we had a young man come down there; we have been trying to get ones that have been discharged out of the army and the navy as far as we can, and I had a great big strapping boy come down, twenty-two years old, and I thought if we ever would get hold of the makings of a good man in railroading that he would be it. He cubbed around there for a few days and come to me; he come to me and said, "I can't get it in my head, these signals, to save my life," and he said, "There is no use my going on there," and he quit and that is all. And we have had a number that would do the same thing. They would work a few days and quit and say they didn't like the work.

Q. Now, one of these trainees, does he train in the yards, whether he is an applicant for the position of switchman or fireman, does he train with a full switching crew?

A. Yes, we have a foreman and two helpers with every crew. We put this trainee with an old experienced crew to start with; it would be bad to put him out with another new man to try to train him, and we fix him with an older man to start with in all cases, for his own safety as well as the men they are working with, and the safety of the equipment. We have had several cases of these men that throw the wrong switch and cause cars to derail or run into cars on another track, and therefore we keep as close watch on them as we can with the older men and with the best we do, we still have some accidents with them by their not knowing just exactly what to do at the right time.

Q. Do you cub more than one trainee with any given crew at the same time?

A. No, he would be in the way; one is bad enough with a crew. It slows the work down with them, and if we do put two on at the same time, we put one with one engine

and one with the other engine on the daylight shift and we tell them at the time that we do not want them working on either job after dark, in any case until they get the lay of the land and the operations that is to be made in their head so that they will not get run over or get hurt; it is a very dangerous movement with a new man. We have at times five switch engines working in the yard at one time on adjoining tracks and numerous road engines going and coming and at the very best we can do, it is dangerous with a man that is knowing what he is doing, and disregarding a man that don't know what is is doing, he is in a powerful dangerous place, and we are doing our best to keep any of them from getting hurt.

Q. Does this trainee perform any actual manual activities that the regular employee would not perform in the regular course of his employment?

A. No, he would not do any manual labor; in fact, he would not do as much as the regular employee. He would be allowed to help and this man would instruct him and let him do part of it, and he would do part of it, and he would have to be with him all the time; he would have to be close to him to advise him on every move because no two moves would be exactly alike.

Q. In other words, whatever the trainee does in the course of his training is to learn the duties of the job that he has applied for; whatever he does along those lines is something that the regular employee is paid to do, is that right?

A. That's right; he is doing just what this regular paid employee instructs him and he is instructed how it has to be done, and to get him acquainted with it he will let him do part of it, gradually coming up to doing it and learning the signals and whenever he is with this regular employee and the foreman down away from him maybe four or five hundred feet from him gives a signal and he tells him to watch that foreman and see what kind of signal he gives, and he will ask him, "Do you see that signal," and he says, "Yes"; after, he says, "Do you know what it means," and he says, "No, I don't know what it means." He will explain to him that he is giving a back-

up signal or a come-up signal, or a cut-off signal, or a track number to go to, and he will explain these signals and get him to watch these signals all the time so that he can get it in his head to know what they mean when he sees one.

Q. State whether or not this applicant or trainee trains under the supervision of the crew or some member of the crew who is paid to do the work.

A. He is put with the regular crew, the regular paid crews and as I have stated, he is put with the man that we call the footboard man on this crew and he starts his training on that end of the job because it is the easiest job on that crew, and gradually picks up the work.

Q. Does this trainee while training have any duty or any responsibility in connection with any movements in the yard?

A. None whatsoever; we don't hold him responsible for anything while he is training.

Q. Does he represent an additional man over and above the normal complement of a regular crew in the yard?

A. He does not.

Q. I say, does he represent an additional man, that is an extra man over and above the regular full crew.

A. No, not as a paid man; he is a trainee with this regular paid crew, but he does not constitute a fourth man with the crew.

Q. Does the railway receive any productive work from his training while he is cubbing?

A. None whatsoever; in other words, he slows up the work with the crew that he is on and the crews would rather not have him, but as I tell them, "You were all new when you come in; you had to be taught how to do this work; we have got to have new ones and it is up to you boys to do this work, to take this man and struggle on with him and do the best you can with him until he learns the duties of the job."

Q. In other words, if I understand you correctly, it is your observation that this trainee is actually a handicap during the period while he is training?

Mr. Cadra: I object to the form of the question.

The Witness: He is a handicap to the crew that he is on; they have got to watch for him and his safety and the safety of the operation and the road and the crew and the switches he is liable to throw wrong if they are not watching right close to him all the time.

Q. Does the railway receive any benefit from this trainee until after he has completed his cubbing and entered upon the regular duties as an employee?

A. Not a bit in the world; he is no help as far as getting the work done; he is no additional help to the crew that he is with.

Q. Now, a trainee training to become a switchman or training to become a fireman in the yard, does he have any definite period within which to train; what I mean by that is, suppose he trains today with a crew in the yard and then lays off two or three days.

A. That is at his option. Now, we have had several cases of that; we would put them to cubbing and on two or three occasions, I don't remember the names of the ones, but they would call and say, "Would it be all right for me not to come in in the morning," and I would tell them it was entirely all right to come whenever he wanted to; it was up to him to come whenever he felt like, and if the weather was bad, a rainy day, which is bad on the regular men and maybe he didn't have a raincoat, he would call and ask would it be an inconvenience for him not to come and I would tell him, "No, if you don't feel like coming in, come in tomorrow, and if you don't want to do that, come when you want to." There is nothing compulsory about cubbing their job out; it is up to them; they can do it as they see fit to cub on the job.

Q. And he is his own judge about when he will train?

A. That's right.

Q. One of these applicants or trainees, is he subject to any of the rules of the company that are applicable to regular employees?

A. None whatsoever; we don't hold him responsible for anything. He is not subject to discipline in any way.

Q. Do you know whether or not he has any status under

the National Railway Labor Act during this period while he is training?

Mr. Cadra: I object to that question.

The Witness: None that I know of.

Q. Is he furnished a permit to cub or oral authority to enter upon the engine or cars of the company for the purpose of this training?

A. Yes, he is furnished written or oral instructions through the crew that he is to be cubbing with.

Q. Is a trainee either for a position as switchman or fireman in the yards required to follow any definite schedule?

A. No, he has no definite schedule to follow at all. Now, that is as far as the switchman end of it is concerned. Now, you are asking about the fireman; when the fireman, of course, comes out from the shops for work, our end of it does not know whether he is an experienced man or not, and the mechanical department handles these cub firemen. Now, I am not familiar with their operations or how they start their cub firemen, but I am speaking for the switching end of it, and not as an authority on the fireman's duties.

Q. Well, so far as trainees for the position of switchmen are concerned, does your company require that such parties train any longer than is actually necessary to learn the lay-out of the yards and the duties of the position which he has applied for?

A. No, he is not required to work any longer than necessary to learn the principles of the job that he is to accept.

Q. Is this training period so far as the company is concerned entered into in good faith with the applicant?

Mr. Cadra: I object to that question.

The Witness: It always is.

Q. State whether or not this training period of the applicant is for the benefit of the applicant himself and to enable him to earn a substantial amount of money after completing his training period?

Mr. Cadra: Object to the form.

The Witness: It is for his own benefit, to learn the different operations and how to take care of himself and not get hurt and not tear up cars or derail trains or cars, and is more for his benefit as far as his personal self is concerned, than anyone else, although we do everything possible to show him the right way and the safe way to do all of his duties.

Q. If such an applicant never qualifies and never goes on the seniority roster, does the railway in such case ever receive any benefit from his cubbing?

A. Not a bit in the world.

Q. Does the railway permit more applicants to cub than it is reasonably anticipated that they might obtain employment for in the immediate future following their training period?

A. No, we have gone to considerable expense on the company to keep from putting a man on when we thought that there was any possibility of his not getting to stay on the job after we got him trained up for it. In the last several weeks we have had to double men at time and a half for the second shift due to not having enough of extra men on the board at the particular time, and knowing the conditions that were likely to take place we refrained from putting on extra men; to do that, they would have to be cut off as soon as some of the injured and sick come back to work. It has been my policy not to hire a man unless I have an awful good idea that he will get to stay with us after we get him trained up.

Q. Now, after December 1, 1943, were all these applicants for a position at a later date as switchmen advised at the time they made their applications that this five dollars was not wages, but was an incentive payment, or more or less expense money?

Mr. Cadra: I object to the form of the question.

The Witness: We told them we would give them five dollars a day to learn the job, and after they had completed their cubbing of the job, we put them on the full rate of pay that the job paid.

Q. Does the general yard master or any other super-

visory official of the railway exercise any jurisdiction, supervision or control over one of these trainees while he is training?

A. Well, all of the yard masters and foremen try to show him and tell him the right and wrong way to take care of a job, and how to do the job in the safe way and how to take care of the equipment by not kicking cars too hard or cutting off cars while they are rolling too fast and staying in the clear of the tracks, and when climbing on top of the car to stand in the middle and to be as safe as possible in learning their work.

Q. In other words, while he is training, he is under the observation of the regular switching crew, is that right?

Mr. Cadra: I object to the form of the question.

The Witness: That's right.

Q. Something was said, I believe, by you yesterday in reference to the fact that sometimes a cub is put to work in an emergency, for example, where a regular employee is taken sick or something; did you make some statement about that?

A. Yes, we had one case; it was the only one that I recall. I believe that sometime last fall someone got sick or hurt, I don't remember the circumstances exactly and we had a man that had been cubbing some four or five days and to keep from tying this crew up, we put him on with this crew to man it that day.

Q. Well, during that period when he was put on with the regular crew, was he paid merely five dollars for that day, or was he paid the regular contractual rate for the position?

A. He was paid the regular scheduled rate.

Q. Is that substantially more than this five dollar incentive payment?

Mr. Cadra: Object to the form of the question.

The Witness: The regular job pays $8.54, I believe it is today, $8.54 and a fraction possibly.

Q. Mr. Whitten, do you have any connection with what we call posting; that is, fellows applying for positions

here in Chattanooga as callers and porters and stenographers and clerks and things like that?

A. No, Mr. Born handles the clerical end of it; as to the need of him being chief clerk, he is better qualified, I have always thought, to pick the clerical help as they are directly under his supervision.

Mr. Whitwell: I believe that is all.

Redirect Examination,

By Mr. Cadra:

Q. Mr. Whitten, you said that there are no schools close to Chattanooga where switchmen might be trained; do you know whether there are schools in the country, say in Memphis, or say the Illinois Central, or any other schools which are available to persons for such training?

A. No, none in the south that I know of; I have heard that there is some road in the north that has a school, but I don't know what road it is. I don't know the name of it, the railroad that operates a school to train their employees beforehand, but I don't remember the road; I am not aware of the fact if there is any in the south.

Q. You spoke about signals, about how many different kinds of signals does a person have to learn?

A. Well, there is numerous signals; on the track signals alone there is thirty-six signals just for track signals alone that he would have to familiarize himself with and other signals he would have to learn, the signals of all the targets and what we call the switch targets; he has to know the position of those targets, what those signals mean, and when an engine blows a whistle he has got to know what that signal means. When a train passes, he has got to know what the signals on that train mean; there are numerous signals that he has got to familiarize himself with.

Q. Are signals used throughout the railroad industry uniform, or are your signals peculiar to the Cravens Yard or the N. C. & St. L. system?

A. As a rule, the boys that works in their own yards make their signals for their different tracks. The Southern Railroad yard and our yard, their signals do not cor-

respond with ours in all cases. Some of their signals do correspond with ours, but most of them, or their track signals, do not, but as far as target signals there is almost uniform colors of red, yellow and green.

Q. What is meant by a target signal?

A. The target, that is the way a switch target, if a switch has got what we call a target on it, in the daytime it is yellow on one side and green on the other, and at night there is a light on there, yellow and green, or red, whichever way conditions stand.

Q. Do you give any class-room instructions on these signals, Mr. Whitten?

A. When they take a general examination they take the whole operating rules, but they learn the signals by being out there among them and the men that they work with show them these signals and show them what they indicate.

Q. Would it not expedite these persons learning the signals if you took them into a class room or gave them one day of instruction on signals; wouldn't they pick it up faster than having to pick it up day by day while out in the yards?

A. As a usual thing I take these men out before I put them to cubbing; I take them out in the yard and show them these signals, show them what their meanings are and which is the stop signal, which is the caution signal, and which is the go-ahead signal, before they attempt to go to cubbing and give them as much instruction on it as we possibly can, but I have always found that they pick the signals up better when they are out working with them; the man working with them explains what the signals are for and what their meanings are and they will pick it up very much quicker than they would by seeing the signals or getting them out of a book and being told about them and not seeing them.

Q. The signals are hand signals, is that right?

A. Part of them are, and part of them are fixed signals on these switch targets, and the main line signals in getting in and out of the yards.

Q. You say that you paid the five dollars a day even should a person who is engaged in cubbing be on the

premises five or six hours during a twenty-four hour period?

A. Yes, we have and especially in the wintertime when the days are short I would tell them not to go to work or get out in the yard until daylight for their own safety, and it would possibly be seven-thirty or eight o'clock before they would actually participate in anything about the engines or the operations.

Q. Now, the regularly employed switchmen, those on the payroll, suppose that they work only two or three or four hours and for one reason or another cannot complete a day's work, do you pay them $8.54, or how is that handled?

A. They get—if it is a case of sickness or injury they get the full day's pay, and the man that we call in his place gets a full day's pay.

Q. You said that you had about three hundred switches, if I recall correctly. Could you give me an estimate of about how many of these are thrown by hand?

A. Well, it would be practically all of these three hundred thrown by hand; on the interlocking plants there is, let me see, I can count them; there would only be ten switches that is handled by the operators in the towers, and that is for going out on to the main tracks. The towerman keeps these switches locked so that no one can get out on to the main line until he is ready for them to proceed on the main line.

Q. Would it be a true statement or not a true statement that just about every time a move is made, some switches have to be thrown?

A. Most every move they make, it is come pull up over the switch and throw it and go one direction, and pull back throwing switches and go another direction, it is practically pulling back and forth over the switches, throwing them and going to the different tracks all day long in the yard.

Q. You also spoke about the fact that it takes some persons quite a bit of time to learn the various operations involved in the yard and so forth, which you have testified to. Now, does it sometimes appear to you that a fellow is not suited for railroad work?

A. Well, yes, we do have cases where they are slow picking it up, but after they do get it they usually make an awful good man if they continue with it. Now—

Q. If a fellow is—; pardon me for interrupting.

A. Go ahead.

Q. Complete whatever you were going to say.

A. I was going to say that a number of them have on their own accord saw that they would not make a railroad man and given it up.

Q. If it appears to you that it is going to take quite a long time for a man to learn his job, as you put it, do you tell the fellow that he had better stop cubbing, that he is not suited, or do you let him come back?

A. I usually let him make his own decisions; I don't recall of telling one yet that he wouldn't make a railroad man. We give him all the chance in the world to make good.

Q. The job of a switchman is pretty strenuous physical work, is it not?

A. Well, the physical work is not so hard, as the main object in the work is the knowing what to do and when to do it and where to be.

Q. These switchmen have to climb cars, do they not?

A. They have to climb cars in some cases, not often. Now, a part of our districts, as I have stated, where there are all hills, when they leave cars they have got to get up there and wind the handbrakes up for safety, but that is not general all over the yards.

Q. In cases where cubs have quit, have they not said as reasons for quitting that the work was too hard on them?

A. Well, I don't know whether they did say it was too hard or whether they didn't like it. I believe we did have one man that had been a railroad man, but he had been a main-line brakeman and I believe he did say that the work was a little too hard on him.

Q. Have some cubs quit you before they were put on the extra board stating that the work is too dangerous and they would rather not be working as a switchman?

A. I don't recall of any stating that they would not like it on account of the danger part of it. We have had

a number of them quit before they completed their cubbing, stating that they were not going to like the railroad work, but they didn't stress the fact that they were afraid of the danger.

Q. You said that the cub does no productive work for the railroad, I think, Mr. Whitten. Just what did you mean by that?

A. He does not do anything as far as being a benefit to the railroad company or the operations of the work, to the job he is with. He does throw the switches; he does cut off some cars with the other man guiding him, leading him and showing him and telling him what to do. I wouldn't consider that as being productive for the company as this other man is handicapped by him being with him, and he is leading him around and showing him every move for his own safety as well as the safety of the fellowman and the fact of the cars that he is on.

Q. By having these persons cub, as matter of fact, is it or is it not true that you are creating a pool of extra men to call on in case there is a job open?

A. Yes, we have to have an extra board; the contract calls for an extra board of enough of men to let the regular men off when they desire to be off. We carry an extra board from twelve to seventeen men when we can get them, and if we get too many men on this extra board and there comes a slack spell in the good weather that the older men don't lay off for maybe five or six or seven days, then the older men come to me and tell me, "We have got too many men on the board, you will have to reduce it," and naturally the last man that was put on has to be cut off.

Q. It does not cost the company any money to cub a man, or does it?

A. Well, I would think it would, from the fact that it slows up the operation that he is on, for that engine.

Q. How would it slow up the operation?

A. This man that he has got with him has got to watch him; he has got to watch his own cars, he has got to watch himself, he has got to be easy with this man, not get him hurt, and explain to him all the conditions and naturally it slows up the movement of this engine considerably in the run of a week, by him taking his time to ex-

plain every move to this man; when he goes to switching it would naturally slow that engine's operations, wouldn't it, during the day?

Q. You mean to say that in the course of a week, not as many cars would be switched or whatever work has to be done on a crew with a cub on it than at other times?

A. There might be approximately the same number of cars would have to be switched, but it could not be switched in the eight hours or ten hours whatever he is with this crew, and the next shift would have to do it or it would be necessary to call an extra engine to get caught up.

Q. Have you ever made a study of that matter?

A. I have watched the operations of the boys that have had these cubs.

Q. As a matter of fact, because there is this extra man with the crew and because he is probably told to go ahead and throw that switch, it actually expedites the work, does it not?

A. It wouldn't expedite the work, no, not a bit in the world for they have got to be too careful with him; they have got to be careful and see that he throws the right switch; they won't let him run as fast with an inexperienced man, the engineer, they send him on slow if they are going to let this man cut off a car; they will slow up the engineer so that the man won't fall or stumble over something; they try to protect the man the best way they can to see that no accidents or injuries happen.

Q. Do you accept applicants for positions of switchmen if there are no positions open on the extra board at that time?

A. No, not if we don't see that we are going to need him by the time that his training is up, why we don't start him.

Q. Mr. Whitten, as a matter of fact, don't these persons applying for positions as switchmen, while cubbing cub daily, sometimes seven days a week?

A. Some of them do, yes.

Q. As a matter of fact, most of them do, do they not?

A. Most of them do; we have had occasion where they would not want to come in on Sunday, or may have something that they want to do and they call up and tell me,

"I won't be there tomorrow," will it be all right with me, and I say, "Perfectly all right; come in when you are ready."

Q. Mr. Whitten, you stated that these switchmen were furnished here with a verbal or written authority to cub; now, when did you start using this written authority to yardmen for use in connection with the cubbing of switchmen?

A. I don't remember the exact date; it is sometime either before or after the first of the year.

Q. As a matter of fact, wasn't it in February or March of this year?

A. It might be; I don't remember the exact date; it was sometime in the year past.

Q. Do you remember whether this new form which you are referring to was inaugurated only after this suit was filed?

A. I don't remember whether it was or not.

Q. The written authority which is referred to is a sheet which reads as follows: "Chattanooga, Tennessee. Yard foremen, switchmen, yard engineers, this will be your authority to permit the bearer, cub switchman ..... to ride your engine for the purpose of familiarizing himself with the duties of switchman.

"Please see that he is thoroughly instructed in all duties pertinent to switching, in safety first rules, and after he has, in your opinion, qualified himself, sign your name to this letter." Signed, "General Yard Master."

Underneath are provided blank spaces for the signatures of the foreman with whom the switchman has cubbed.

A. That's right.

Q. Now, this form, Mr. Whitten, according to your best recollection when was this form first used?

A. I don't remember what time the first one was used.

Q. Prior to the use of this form here, did you use any other written form?

A. We would verbally tell the foreman and would tell him to give us a card with his signature on it when this man worked with him, cubbed with him, and then we would talk with him and ask him what he thought about the man and his ability to learn the job.

Q. Mr. Whitten, did you have occasion recently to check how many of these written permits which have been filled out, you have on file?

A. I haven't checked back over to see how many of them we have on file.

Q. Have you not checked only last week with me to see how many you had there?

A. That was the only time.

Q. And how many did you find?

A. I believe it was two.

Q. And were they all dated in either February or March of this year?

A. I don't remember what the dates on them were.

Q. Do you remember whether they were in 1945?

A. I believe they were 1945.

Q. I hand you herewith such a permit for P. B. Turner, dated March 9, 1945.

A. Yes.

Q. Would you look that over and state whether or not that appears to be a true copy?

A. Yes, this appears to be a copy of the form that we give to the foreman.

Q. I have another written permit dated March 17, 1945, which also was by Mr. Porter; I will show you this and ask you whether that is the second of the permits that you were able to find at that time.

A. That appears to be a copy of what we have on file.

Mr. Cadra: That is all.

Mr. Whitwell: That is all.

Further saith not.

JOHN HARRISON WHITTEN.

I hereby certify the foregoing transcript to be a true and correct transcript of the testimony of John Harrison Whitten, taken before Joe Hunter, Notary Public in and for Hamilton County, Tennessee, on May 8 and 9, 1945.

FRANCIS J. McSWIGGAN,
Certified Shorthand Reporter.
(N. Y. S. Certificate #191.)

TRANSCRIPT OF EVIDENCE.

Appearances:

For the Plaintiff, Jeter S. Ray, Geo. W. Jansen and Paul M. Cadra.

For the Defendant, Walton Whitwell and Edwin F. Hunt.

This case came on to be heard on Wednesday, May 16, 1945, when the following proceedings were had:

Judge Davies: Gentlemen, I want to introduce to you my associate, Judge Louie W. Strum of Jacksonville, Florida, and he will try this case.

Mr. Ray: May it please your Honor, I want to introduce to your Honor Mr. George W. Jansen, Supervising Attorney, Office of Solicitor, United States Department of Labor, who is here to try the case for the Government.

Judge Davis: All right. We are glad to have you with us.

(Thereupon Judge Davies retired and Judge Strum proceeded with the trial of the case.)

The Court: Gentlemen, I have read your pleadings and I know what the issues are and I think if we discuss the situation a little here we can simplify the matters that will be litigated.

I notice by reading the pleadings that the Defendant says that as to all trainees except brakemen—and what else have you—firemen, brakemen and switchmen, that it is now in compliance with the Act and has been for sometime past. Now, is the Plaintiff conceding that to be the case?

Mr. Jansen: The Plaintiff does not concede that, if your Honor please.

The Court: Well, in what respects do you now contend that they are not complying?

Mr. Jansen: May it please the Court, we contend that the Defendant has failed to pay many of its employees, men

who have cubbed for yard clerks and other jobs. It is true the Defendant does, in its answer, allege that it is in compliance but we have information and expect to prove that they are not.

The Court: Well, do you have witnesses here to testify that they have worked in these capacities that received wages less than those prescribed by the Act?

Mr. Jansen: We have, your Honor.

The Court: Well, the Court will hear you then if that is the case. Now, as to firemen, engineers, switchmen, you claim that the situation is the same, do you?

Mr. Jansen: We claim that the situation is the same, yes sir, your Honor. We claim that many firemen, switchmen and brakemen are being employed by the Defendant without payment of the minimum wage prescribed by the Act.

The Court: Well, what do you want to say for the Defendant, Counsel? Do you agree with what counsel for the Plaintiff has just stated here or do you still insist that you are complying with the Act as to these office employees, other than firemen, switchmen and brakemen?

Mr. Whitwell: May it please the Court, our position is as set out in the answer, that when the Wage and Hour Act became effective the management of the Company elected to treat the Act as if applicable to persons posting for positions such as porters, callers, clerks, stenographers and messengers and that then the management issued instructions to its supervisory officers to pay persons posting for these various clerical positions and the management insisted that that be carried out.

The Court: The Chattanooga suit was instituted and dismissed and since that time you say that they have been paid?

Mr. Whitwell: Since that time they have gone back and taken the list, as best they could arrange it and have issued instructions that these people be paid and vouchers have been issued to those, substantially all of them, and to every-

body who they could locate these vouchers have been delivered, or have been issued.

The Court: What about currently since—what was that date, November, 1944, you say?

Mr. Whitwell: Yes, sir.

The Court: You corrected that situation at Chattanooga?

Mr. Whitwell: Yes, sir.

The Court: Since that time have you currently paid this type of persons that we are speaking of here now the wage and hour scale or more?

Mr. Whitwell: Yes, sir.

The Court: Well, I want to ask counsel for Plaintiff here as of what time do you intend to now claim that they have paid sub-standard wages to these office employees, way back yonder or since November, 1944?

Mr. Jansen: May it please the Court, the Defendant, in its answer alleges that failure to pay office employees existed with regard to the Cravens Yard only and that they have since corrected it. We deny that they have corrected it and we also deny that it exists with reference to the Cravens Yards only.

The Court: Now, if they are in compliance with this Act now as to any of these people, then unless there is some reasonable ground to suppose that they are going to violate the Act in the future, there is no use litigating about something that the Defendant is already complying with, so, unless you want to show that they are now presently failing to observe the Act, why, there is no use litigating about something that occurred way back yonder a year or two ago.

Mr. Jansen: May it please the Court, we propose to show not only that they have failed to comply but also that there is reasonable ground to suppose that they will not comply in the future.

The Court: I see. All right. Well, I am ready to proceed. Call the witnesses for the Plaintiff.

(Witnesses called and sworn.)

The Court: Do you want to make further formal statement to the Court for the Plaintiff?

Mr. Jansen: No, may it please the Court.

The Court: Proceed.

EVIDENCE ON BEHALF OF THE PLAINTIFF.

W. J. McWHORTER, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your name is W. J. McWhorter?
A. That is right.
Q. How old are you, Mr. McWhorter?
A. Sixty-two years of age.
Q. Where do you live?
A. Nashville, Tennessee.
Q. And how are you employed?
A. I am Acting General Manager of The Nashville, Chattanooga & St. Louis Railway.
Q. How long have you been Acting General Manager of The Nashville, Chattanooga & St. Louis Railway?
A. Since March 13th, this year.
Q. Before that time how were you employed?
A. Assistant General Manager.
Q. How long were you Assistant General Manager?
A. Seven years.

Mr. Jansen: If it please the Court, the Plaintiff desires to call this witness as an adverse witness under the rules.

The Court: Well, proceed.

By Mr. Jansen:

Q. Now, Mr. McWhorter, how long have you been with The Nashville, Chattanooga & St. Louis Railway?
A. Forty-one years.

Q. And what position did you start with with the Railway?

A. Telegraph operator.

Q. And then you went through the various types of jobs until you became Assistant General Manager and now are Acting General Manager?

A. That is correct.

Q. I presume you are familiar with the operations of the Railway, the location and general operations of the Railway?

A. I think so, yes, sir.

Q. Now, The Nashville, Chattanooga & St. Louis Railway is a system which extends from Memphis to Atlanta, is that correct?

A. Memphis to Atlanta, and also to Hickman and Paducah, Kentucky.

The Court: Now, Counsel, let's don't start with a lot of things that are not in issue. Nobody denies that in these pleadings. That is admitted. Now, let's get right down to what is in dispute here and litigated. All right, go ahead.

By Mr. Jansen:

Q. Mr. McWhorter, you are familiar with the issues in this case?

A. In a general way, yes, sir.

Q. You have in your employ brakemen, switchmen, firemen and engineers, have you?

A. Yes, sir.

Q. Until December, 1943, it was the practice of your Railroad to cub men for the jobs of fireman, switchman and brakeman, is that correct?

A. That is correct.

Q. You still cub men for the jobs of fireman, switchman and brakeman, do you not?

A. That is correct.

Q. But prior to December 1st, 1943, you paid those cubs during the cubbing period no compensation whatsoever, is that correct?

A. That is right, in recent years. Now, what the practice was way back twenty-five or thirty years ago I just don't know.

Q. Didn't you have a practice during the last war of paying cubs $1.00 per day?

A. During the last war—I am not so positive about that. I think there was a period in there about that time but whether it was during the war or immediately following, I just don't recall.

Q. In any event, around the time of the first World War you paid wages to cubs of about $1.00 a day as you recollect it?

A. No, we were not paying wages. We paid $1.00 a day, however, for the cubs to enable them to support themselves.

Q. Do you claim that money you paid was not wages?

A. That is the way we considered it, yes, sir.

Q. And the money that you have paid certain cubs since December 1st, 1943, do you claim that that is not wages?

A. That is right.

Q. What do you claim it is?

A. Well, it is money to help defray their expenses during the training period.

Q. How much have you been paying cubs since December 1st, 1943?

A. $5.00 a day.

By the Court:

Q. Firemen, engineers, switchmen and brakemen?

A. Yes, sir.

Q. Now, that is cubs for positions of fireman, switchman and brakeman. The others you don't pay at all?

A. Students for clerks?

Q. Yes, sir.

A. Yes, sir, we pay them.

Q. You pay them, too?

A. Pay them the minimum rate provided by the Fair Labor Standards Act.

Q. While they are in training?

A. That is right.

The Court: I see.

By Mr. Jansen:

Q. Now, this $5.00 per day you pay cubs you claim is not wages?

A. That is my position, yes, sir.

Q. You claim you don't pay that to them as compensation for services performed, is that correct?

A. That is right.

Q. That is an emergency measure your Company has adopted since the war, is it not?

A. Yes, sir, it was adopted since the war as an inducement or incentive to get men to train for those positions.

Q. And is a measure that was adopted by the Company because of the present war and because of the shortage of men?

A. That is right, because of the shortage of manpower brought on by war conditions.

Q. Yes, sir. And you claim that that is nothing more than an inducement to get them to come on and take your training, is that right?

A. That is right.

Q. That is, I assume, a measure that was adopted for the duration of the war or the present manpower shortage, is it?

A. Well, there is no fixed time as to the continuance of that policy. Just how long it will be continued I don't know.

Q. Was it adopted as the result of some agreement with the brotherhoods?

A. No, it is only on the volition of the management.

Q. You had no agreement at all with the brotherhoods with regard to this money that you are paying cubs at all?

A. None at all.

Q. Now, in your answer you allege that it is the result of some joint conference. Do you have any record of any joint conference between the management and the labor representatives?

A. I have copy of a letter from Mr. J. J. Pelley, who is president of the Association of American Railroads with respect to a conference between the labor representatives

and the representatives of management participated in, I believe, by the ODT representatives.

Q. Did you participate in that conference?

A. Personally, no.

Q. So it is your idea that you did this of your own volition?

A. That is correct.

Q. Now, all of the cubs for the jobs of switchman, brakeman and fireman are not given this $5.00 a day, are they? I mean by this, those who do not complete their training don't receive the $5.00 a day?

A. Well, that was my original instructions, effective December 1st, 1943. I directed the superintendents to pay persons cubbing for the positions of fireman, brakeman and switchman $5.00 a day except those that might cub for a short time and leave of their own volition.

Q. Did you bring with you a copy of those instructions?

A. Yes, sir.

Q. May I see those, please?

(Papers handed to counsel.)

Q. Are these all copies of the same thing?

A. Yes, sir, several copies of the same letter.

Q. They are identical copies, are they?

A. Yes, sir.

Q. Suppose we just take one. Now, I call your attention to a letter which you have just handed to me. Will you tell me what that is?

A. Well, it is a letter directed to the division superintendents with respect to the payment of student firemen and student brakemen, effective December 1st, 1943 in the amount of $5.00 per day.

Mr. Jansen: I will ask that this be marked Plaintiff's Exhibit No. 1.

(Paper so filed and marked.)

Q. Mr. McWhorter, do you have some subsequent correspondence with your division superintendents regarding this $5.00 per day?

A. Well, there was some subsequent correspondence in which questions were asked, etc.

Q. Do you have that with you?

A. Not all of it.

Q. Do you have any of it with you?

A. There was quite a voluminus file on that. I have a letter here addressed to Superintendent Swindell at Atlanta, December 15th.

The Court: Why should we go into all this detail about it? They admit they didn't pay those people anything but $5.00 a day. Now, that is evidence and that is what you are complaining about, so why go into all these details and give all the reasons for it?

Mr. Jansen: They admit they didn't pay them. Then I want to establish the situation with regard to these trainees who didn't complete their training.

The Court: Well, he admits, as to those, he didn't pay them anything. So that is what you are complaining of and I don't see any point of going into the details about it. He admits the fact, the ultimate fact.

A. May I state this, that the December 1st, 1943 instructions do not require payment for those cubs who left of their own volition but sometime ago information came to me that some of those cubs at least were under the impression that they were to be paid $5.00 a day, even though they may have left of their own volition. Well, in view of that impression in their minds, to be perfectly fair with them, I instructed the superintendents to pay those men $5.00 a day for the days that they cubbed.

By Mr. Jansen:

Q. Those men who had that impression, you say?

A. Pay them all because I didn't want to be partial to some few and the others let go but the purpose of that payment was due to the impression gained by some of them that they were to receive $5.00 a day. We want to treat them all alike.

Q. Have they been paid this $5.00 a day?

A. As far as I know. The instructions have been issued.

Q. How long ago were those instructions issued?

A. Oh, I would say probably two or three months. I am not positive as to the date.

Q. And you think that all the men who didn't complete their training have been paid $5.00 a day for the days that they were there?

A. I think those that could be reached have been paid. Now, that was my instructions. I can't say whether they have all been paid or not.

Q. And those instructions were issued, you say, because of an impression that the men got that they were to receive $5.00 per day whether they completed their training or not?

A. That is right.

Q. And that was not considered by you as wages?

A. No.

Q. And that $5.00 is an emergency measure, you testified?

A. It has gone to the cubs as subsistence to help defray their expenses while out on the road and to help take care of their families. Now, when we decided to pay this $5.00 a day there was a great many of our young men being drawn into the military service and it looked as if practically all of the young men would be sooner or later drawn into the military service and we undertook to get men thirty-five and forty years of age and practically all men in that age group had families and we felt it was nothing but right and an inducement to get men to pay them $5.00 a day to help support them during this non-employment period.

Q. Then if I understand you correctly, you don't admit that those men are employees while they are cubbing?

A. No, sir.

Q. And you don't admit that the $5.00 is wages that you pay to employees while they are cubbing?

A. I do not, no, sir.

Q. Now, with regard to these instructions that you say have been issued within the last couple of months to pay

these men who did not complete their training, were they written instructions?

A. As I recall, they were. I haven't copy of the instructions with me but if they were written they are in my files in the office.

Q. You don't know when those payments were made to those men who hadn't completed their training?

A. No, I don't have anything to do with that feature of it. That is in the accounting and paymaster's offices.

Q. These instructions that you speak of to pay these men who had not completed their training were issued after this suit was started, were they not?

A. Yes, sir, I think so. As I recall, my first information of the suit was the latter part of last year, November or December. I am quite sure that the instructions were issued subsequent to that time.

Cross Examination,

By Mr. Whitwell:

Q. Mr. McWhorter, prior to the time that you became General Manager and Assistant General Manager what position did you hold with the Company?

A. Since my first employment?

Q. Immediately prior to that. I don't want to go into all of that.

A. Immediately prior to my promotion to Assistant General Manager I was superintendent on the Nashville and Paducah and Memphis Divisions. I held that position for ten years.

Q. Now, during the time that you held that position and, of course, since that time have you been familiar with the Company's practices in reference to applications and the cubbing of persons who filed for positions of brakemen, firemen and switchmen with The Nashville, Chattanooga & St. Louis Railway?

A. I have.

Q. What has been the Company's practice in reference to the different steps that an applicant goes through that lead up to employment for the position for which he has applied?

A. When an applicant applies for the position of fireman or brakeman he is first required to fill out an application blank or form, which requires his name, age and prior service, if any, references, etc. And then he is also required to undergo a physical examination to determine whether or not he is fit physically for the position sought. And then he is put on the road, in the case of a road fireman, to cub with a regular fireman, and in the case of a brakeman, he is put on the road to cub with a regular brakeman and regular conductor.

Q. Now, Mr. McWhorter, is this practice that you speak of or not one of long standing with this Company and among railroads generally throughout the United States?

A. It is, yes, sir.

Q. Now, why is it necessary for an applicant to cub or train before he will be employed by the Company for the position applied for?

A. Well, there are many angles of the position to which the applicant must conform himself. In the case of the applicant for position of brakeman he must learn the road, learn the duties of a brakeman such as coupling and uncoupling cars, performing station switching; he must know the location of the various stations and the tracks that might have to be switched and he must inform himself with respect to protecting the rear or front of his train in case such protection is required. And then he is required to undergo an examination on the rules, operating rules. He must know those rules in order to successfully and safely perform the duties of a brakeman and protect himself and protect the men with whom he works.

Q. Is there any school that you know of, Mr. McWhorter, where a person applying for the position of switchman or brakeman or fireman on The Nashville, Chattanooga & St. Louis Railway can get his training?

A. I don't know of any such school.

Q. If there were such a school would he still have to cub or train for a period in order to learn the physical location of switches, sidetracks, housetracks, stations and various things along the railway of the NC&StL Railway?

A. Definitely he would.

Q. If a person comes to the NC&StL Railway and makes

application for one of these positions even though he may have had prior railroad experience with some other railroad, would it still be necessary for that man to undergo training or a cubbing period in order to learn these different locations on the line of road and the various things about which you have just made a statement?

A. He would, yes sir.

Q. Now, Mr. McWhorter, generally speaking, upon what does the length of this training period necessarily depend?

A. Will you please restate that question?

Q. Upon what does the length of the training period, the time that it takes an applicant to learn the duties of a brakeman or switchman or fireman on a given division? Upon what does that depend?

A. That depends upon the aptitude of the man, his ability to grasp and understand. Some men can get things of that sort quicker than others.

Q. Would the question of whether he had prior experience with other railroads enter into the picture?

A. Yes sir, that would help to the extent of enabling him to finish his cubbing period quicker by reason of the fact that he would know of car handling such as coupling and uncoupling cars, how to throw switches and things of that sort.

Q. Would or not it also depend upon the miles of road, the length of the road and the number of stations, number of switches, number of yards, number of sidetracks and various things like that?

A. That is true. He would have to learn all those various things.

Q. Now, under whose supervision does this man train while he is preparing himself for the position sought?

A. In the case of a cub brakeman, he trains under the supervision of the crew to which he is sent and on which he is placed for training. In the case of a cub fireman, why, he is under the supervision of the regular fireman on the engine where he is cubbing, and also the engineer.

Q. Does or not that person cub with the regular crew, a full crew?

A. Yes sir.

Q. Does this cub, while he is cubbing, have any duties

or any responsibilities whatsoever in connection with the operation of that train or any other railroad operation?

A. He does not.

Q. Who does have that responsibility?

A. The regular crew employed on the train and paid for that purpose.

Q. Does he, insofar as your experience goes and as far as any knowledge goes, perform any manual activity that a regular man is not there ready and prepared and paid to perform?

A. I don't know of any, no sir.

Q. Does the Company receive any benefit from the activity of the cub during the period while cubbing?

A. It does not.

Q. If, for example, a person cubbing for the position of brakeman, should get on a train at Nashville that is destined for Cowan or Chattanooga and that cub, we will call him, decides for some reason or for no reason to get off the train at Murfreesboro, does that train go on just the same?

A. Just the same, yes sir.

Q. When, if any time, does the Railway first begin to receive benefit by reason of the fact a person has cubbed for one of these positions?

A. After he has completed his training period or his cubbing period and is placed on the extra board where he is subject to call for service. Then the training and knowledge gained during that training period is beneficial to the Company by reason of his ability to carry on as a regular or extra employee.

Q. If a person cubs for the position of brakeman, switchman or brakeman and never completes his cubbing and never goes on the seniority roster of employees and never works as a regular employee does the Railway ever derive any benefit at all by reason of the fact that that person cubbed?

A. None whatsoever.

Q. Is it necessary for that person to cub from the standpoint of his own safety?

A. It is.

Q. Is this person, while cubbing, subject to any of the rules of the Company that are applicable to its employees?

A. No sir.

Q. Is he subject to any discipline or any control by the Company?

A. He is not.

Q. Now, Mr. McWhorter, you said that prior to December 1, 1943 that persons applying for positions of brakemen or firemen or switchmen weren't paid any amount during the cubbing period. I believe that is what you said.

A. Yes sir. That is for several years prior to December 1, 1943.

Q. Now, you say that effective December 1st, 1943 the NC&StL Railway adopted the policy of making what you term incentive payments of $5.00 a day to such persons during their cubbing period, provided they completed their cubbing, and that later you understood that some of the persons who did not complete their cubbing period understood that they were to be paid $5.00 or misunderstood the instructions, however you want to put that, and, therefore, you issued instructions that those men be paid this $5.00 a day whether they completed their cubbing or not, is that correct?

A. That is correct. I might add there that I didn't want them to feel that probably they had been done an injustice and left with a misunderstanding.

Q. Did the fact that you made these $5.00 payments to these persons—was that influenced or controlled by this lawsuit in any manner?

A. None whatsoever.

Q. In making that $5.00 payment were you undertaking to comply with the Wage and Hour Law or were you simply arriving at a subsistence or expense figure or incentive figure?

A. I had no information with reference to the Wage and Hour Law. I was trying to determine an amount that would at least be helpful in defraying the expenses of these cubs while away from home and also help support their families while they were away.

Q. Was that payment of $5.00 a day purely voluntary on the part of the Company?

A. Absolutely.

Q. Could, as you understand it, it be withdrawn at any time?

A. Yes sir.

Q. Could it have been $2.00 a day or $4.00 a day or $6.00 a day as well as $5.00 a day?

A. It could have been any amount that we might have decided to allow.

Q. Does it carry with it any reference in any manner to overtime or anything like that?

A. None whatever, no sir.

Q. If it had been a payment arrived at to be paid to an employee would it necessarily have been negotiated by collective bargaining and negotiations with the trainmen's organization?

A. It would have.

Q. Now, you spoke of this national committee that Mr. Jansen called your attention to. I believe this committee referred to making recommendations was a national committee?

A. That is right.

Q. Composed of representatives of the different trainmen's organizations and representatives of railroad executives of the country?

A. That is right.

Q. And I believe you said the ODT had something to do with it?

A. That is right.

Q. And I believe you said that one of the recommendations of the committee, of which the labor organizations was a part, was that the railroads consider making payments to persons while cubbing during that pre-employment period, is that right?

A. That is correct.

Q. Now, will you turn to that recommendation No. 8 and read to us just what that recommendation was?

A. (Reading) "No 8. Training. It was agreed that the conditions for the duration would require more intensive on—as well as off—job training and some pre-employment training. It was suggested that on-job training might be accomplished by increase of supervision, placing trainees in gangs with qualified workmen and rotating

trainees, the purpose being to make fully qualified employees of the trainees in the shortest practicable time. It was suggested that the off-job training might be accomplished in school rooms, during working hours or after working hours, or by correspondence courses. The pre-employment training would involve prospective employees who would have to be trained before they could enter service. This training would probably be through the schoolroom method. As an aid to obtaining necessary manpower the railroads should consider the payment of compensation to men during the pre-employment training periods."

Q. In other words, that committee used the language: "Pre-employment training periods", is that right?

A. That is right.

Q. Now, are rates of pay for regular employees for the positions of brakemen, firemen and switchmen, are they left to the judgment and discretion of the management of the Railroad or are they arrived at by negotiation and collective bargaining, mediation and things like that?

A. They are not left to the determination of the management of the railroads. They are determined by negotiation between the representatives of the employees and representatives of management, and if those parties are unable to agree, either party may invoke mediation. If mediation fails to bring them together, then arbitration is suggested.

Q. Now, in those cases of regular employees where a wage rate is agreed upon by the Railway and the representatives of those organizations may a railroad company voluntarily withdraw that rate of pay?

A. No, that becomes fixed, and can only be changed by at least thirty days written notice, at which time the representatives of the employees can come in for a conference and discuss it.

Q. Now, when this person who has cubbed during the period when you have been making this incentive payment of $5.00 a day, when that person completes his training period and otherwise qualifies and becomes enrolled upon the roster of employees and starts to work, does that $5.00 a day follow him or is he then paid a different compensation arrived at by a different method?

A. He is paid different compensation determined by entirely a different method, as I have just described, by negotiation between the representatives of the two parties and that becomes a fixed rate for that particular job.

Q. And is it greater or less than this $5.00 about which you spoke?

A. It is greater.

Q. Does that person, upon becoming an employee and going to work, draw the same rate, contractual rate of pay that any other person in that type of employment draws who has been working for a number of years?

A. He does, yes sir.

Q. Now, Mr. McWhorter, I want to ask you a few questions about this posting. What instructions, if any, did you issue to the various superintendents in reference to paying persons while posting for positions such as porter, caller, messenger, stenographer and clerk?

A. My instructions with reference to such has been, with reference to such students was to pay them an amount equal to the minimum provided by the Wage and Hour or the Fair Labor Standards Act.

Q. Was that back, sometime back when the Act became effective?

A. Well, when the Act became effective, October 24th, 1938, I believe it was, we were not putting on any students. In fact, we had some employees cut off and ready to come back as soon as business would justify their return, and for some two or three years or probably a little longer there was no need to post people for employment such as clerks, stenographers, callers, etc.

Q. Did those instructions go out to the superintendents of the various divisions of the NC&StL Railway?

A. Yes sir.

Q. As far as you know until recently, until after this suit was brought were those instructions being carried out?

A. They were as far as I knew, and to warrant that belief, I had received many letter from superintendents asking for authority to put these student clerks, stenographers, callers, etc. on in order to permit them to train for those respective positions.

Q. And so far as you know now, have those instructions been carried out at every place except at Chattanooga?

A. Yes sir.

By the Court:

Q. Have they originally been observed and are now being observed at Chattanooga?

A. As far as I know they are now being observed at Chattanooga.

Q. You pay all the messengers, porters and everybody except the student employees in accordance with the Wage and Hour Act, do you?

A. Yes sir.

Mr. Whitwell: I wanted to just briefly give you a picture.

Q. Now, Mr. McWhorter, when did it first come to your attention that your instructions with reference to paying these people posting at Chattanooga had not been carried out?

A. Well, it was sometime after this lawsuit was filed. I don't recall the exact date. It was developed that some people at Chattanooga had been posting without pay and we immediately asked the superintendent to give us the names of applicants and the positions for which they had posted, and when we received that information we issued vouchers for payment of all time consumed in posting at the minimum rate provided by the Act.

Q. I will ask you whether or not that situation, that isolated situation at Chattanooga was called to your attention and the attention of the Railway as a result of the investigation which inspectors of the Wage and Hour Division had evidently made, which brought about this lawsuit?

A. It was, yes sir.

Q. Now, you say that vouchers have been issued and effort has been made to go back and pay all those persons for the period while posting and comply really with instructions which you originally issued, is that true?

A. That is correct.

Q. Now, has that situation at Chattanooga and else-

where wherever it might develop in isolated instances been corrected?

A. As far as I know, it has. I instructed that it be corrected. So far as I know, they have been paid.

Q. Since this matter has been brought to the attention of the Railway have you instructed the departmental superintendents to pay all the persons from that time on in the future the minimum provided by the Wage and Hour Law and to keep record of the days and hours posted?

A. Yes sir, I have.

Q. In other words, the present practice—the erroneous practice there in reference to your instructions has been corrected and presently you are treating the Wage and Hour Law as if it applies and are complying with it, is that right?

A. That is correct.

By the Court:

Q. That is true as to all except student brakemen, switchmen and firemen?

A. Well, we are now paying student brakemen, switchmen and firemen.

Q. Are you paying them $5.00 a day?

A. $5.00 a day.

Mr. Whitwell: But your Honor is right. What I am developing is with reference to people who post and not people who cub for positions of firemen, brakemen and switchmen.

I believe that is all.

Redirect Examination,

By Mr. Jansen:

Q. Do I understand that your Company now admits that persons who post for jobs of yard clerk, porter, stenographer and other office positions, while they are posting are employees?

A. No, I don't think I said that.

Q. Well, what is the fact? Do you admit that they are employees or do you not?

A. No, I don't consider that they are employees.

Q. Well, will you explain why you consider the men in the office differently from switchmen, brakemen and firemen?

A. Well, in the case of a clerk or stenographer, messenger, caller and positions like that we concluded that there was the possibility that such student might perform a service that would be beneficial to the Railway while out posting with the regular employee and for that reason we did not want to be caught in the position of having such student perform a service to the Railway without compensating him as required by the Act.

Q. Is there any other reason for the distinction between the office help and brakemen, switchmen and firemen?

A. No, that is the only reason that I know of.

Q. Now, with regard to switchmen and brakemen, I believe you stated that the trainee is in addition to the regular crew, is that right, in addition to the crew?

A. I don't know that I exactly understand your question.

Q. Well, is the trainee an extra man with the crew?

A. No, I wouldn't use the expression an additional member of the crew.

Q. No, no?

A. He is just out there to learn the duties of this particular job.

Q. He is, I believe you said, an extra man on the crew?

A. No, I wouldn't say that because employees are known as extra men, brakemen and firemen who qualify, those cubs who qualify for those positions finally go on the board and they are called extra men. Now, they are regular employees.

Q. Now, I am not talking about the men on the extra board. I am talking about the trainee who is with the crew. Let's take, for example, a switchman. What is your regular assigned crew in switching operations, the ground crew?

A. The ground crew consists of a foreman and two switchmen.

Q. And that is the usual assigned crew?

A. That is true.

Q. So if a cub is with the ground crew of a foreman

and two switchmen he would be there as an addition to the regular crew? I mean he wouldn't be part of the crew, you claim, but he would be there an extra man?

A. He wouldn't be a part of the crew; neither would he be an extra man.

Q. Well, you consider him then sorter like the fifth wheel of a wagon?

A. He is just out there learning the duties of that particular work.

Q. And you consider that he is there a sort of fifth wheel on a wagon?

A. I never considered him as a fifth wheel, no sir.

Q. Now, has it always been the practice of the Railroad, your Railroad to limit its crew, its ground crew in switching operations to a conductor and two switchmen or brakemen?

A. No, we have had periods where the crew consisted of different numbers.

Q. You have had periods, as a matter of fact, Mr. McWhorter, where the crew, the ground crew in switching operations was as large as seven, haven't you?

A. The ground crew?

Q. Yes sir.

A. No, not with a regular switch engine. Now, if you are thinking about hump jobs where we switch cars over a hump you will find a condition of that kind.

Q. And you have had ground crews where the number in the crew was as many as six?

A. No. Excluding hump crews, we have never had any such size as an ordinary switching crew.

Q. What is the largest number of men that you have carried at one time on a single switching crew in switching operations?

A. Well, I think we had two or three jobs in Atlanta several years ago where we had three switchmen. That was on account of the work being far in excess for a crew of two switchmen and a foreman.

Q. You always have just one foreman or conductor?

A. That is right.

Q. On a crew but it is not uncommon or at least it has not been uncommon in the past to have a number of

helpers, that is, switchmen in addition to the conductor and varying with the amount of work to be done. At times you have had a conductor and one and at times you have had a conductor and six or seven helpers, is that right?

A. I don't know that we have ever had six or seven; I couldn't say that.

Q. Well, let me call you attention to the message of Fitzgerald Hall—he is your president, is he not?

A. That is right.

Q. And this is particularly with reference to the message of your president, Fitzgerald Hall, dated October 15, 1939, in which he says: "We have had ground crews with switch engines at various times and places ranging from foreman and one helper to foreman and seven helpers, the number of helpers varying with the amount of work to be done."

A. That is President Hall's message. I am really not qualified to interpret it.

Q. He is your superior; he is over you?

A. Oh, yes. But just what he had in mind I really don't know unless he was talking about these hump crews that I have just referred to.

Q. How about that which I have just read, just quoted to you?

The Court: I don't think it makes a bit of difference what the president says. You are examining this witness here now. If you want to find out what the president says, bring him down here and we will see about it.

Mr. Jansen: Do I understand the Court objects to the question?

The Court: I tell you that the question is immaterial, yes sir.

Mr. Jansen: Note an exception.

Q. What is the largest crew, ordinary switching crew?

A. The ordinary switching crew, as far as I know, now consists of a foreman and two switchmen and an engineer and a fireman.

Q. May it consist of a foreman and three switchmen?

A. When I say an ordinary switching crew I eliminate hump crews just previously referred to.

Q. Now, Mr. McWhorter, you said in answer to your attorney's question that one of the reasons, in fact, the first reason that you gave that you trained cubs was that they would learn the road, is that right?

A. Not only learn the road but learn the duties of the position sought by them.

Q. But the first reason you gave, as I recall it, was that they would learn the road.

A. That was one of the reasons. Whether it was the first, I don't recall.

Q. Now, as a matter of fact, Mr. McWhorter, a man who is training for a brakeman's job usually makes a run on each one of the divisions of the road, does he not, before he can take the examination?

A. No sir, not on each division.

Q. Are you familiar with the schedule that is given to each cub brakeman when he starts out in his training period?

A. Well, only in a general way. That is handled by the division people, the division superintendents, road-masters and master mechanics.

Q. In any event, a cub brakeman is given a schedule, we will say, on the Nashville Division. Is the Nashville Division just one division of the Railroad?

A. The Nashville Division and the Chattanooga Division is one seniority district. Now, men applying for positions of brakemen or firemen on those divisions are required to cub both divisions. They extend from Chattanooga to Hickman, Kentucky, and the other divisions are separate seniority districts. There are five divisions on the system.

Q. And a cub brakeman who trains on the Nashville and Chattanooga Divisions is required, you say, to cub on each division?

A. That is right.

Q. And he is required to make each of the runs on that division, is he not?

A. I don't know that I understand that question. Do you mean every run that operates on the two divisions?

Q. Each of the separate runs. You have a local train, for example, from Nashville to Bruceton?

A. Yes sir, we have several runs. We have about 57 to 60 trains a day, twenty-four hour period.

Q. But you have local trains, do you not?

A. That is right.

Q. And through freights?

A. That is right.

Q. And you have extra trains, and you have a train which starts in Nashville and terminates, that is, a run which starts in Nashville and terminates in Bruceton?

A. That is right.

Q. That is one run, isn't it?

A. Yes sir.

Q. Then you have a run which starts in Nashville and terminates in Cowan, don't you?

A. Yes sir.

Q. And a run which starts in Cowan and terminates in Chattanooga, or the reverse?

A. Yes sir.

Q. So a cub brakeman would be required to at least make a round trip on the run from Nashville to Bruceton, would he not?

A. Yes sir, at least one round trip.

Q. And then would be required to make a round trip from Nashville to Cowan?

A. Yes sir.

Q. And then he would be required to make a round trip from Cowan to Chattanooga?

A. That is right.

Q. And there are a number of other items that are included on this schedule that he is required to follow, aren't there?

A. Well, I don't know; I am not qualified to—

Q. Well, in a general way?

A. —testify as to those schedules because, as I say, that is fixed by the division people, but generally that is correct.

Q. Well, you did express an opinion with regard to the work that these cub brakemen did, didn't you?

A. Yes sir, but all those things are not specified on the schedule.

Q. I understand that. You do know, do you not, that a cub brakeman when he makes a local freight run in his training helps load and unload freight out of box cars and into box cars?

A. He may do that, yes.

Q. You know that he does, don't you?

A. I don't know that I have been on a train where we had a cub brakeman but I am sure that that is the practice because he couldn't learn the work if he didn't do those things.

Q. And when he is on the baggage run—most of them are required to make the baggage run, are they not?

A. I think so.

Q. And when he is on the baggage run he helps move baggage and load and unload baggage and makes up tickets for it; you know that too?

A. He might have to do that in an effort to learn the duties of a baggagemaster but while that is going on the regular baggagemaster is standing there ready and willing to do the work. In other words, what a cub might do in that respect would not advance the movement of the train or wouldn't advance the work.

Q. Well, if you had a cub and the regular brakeman both unloading freight you mean to say that it wouldn't be unloaded faster than if you had the brakeman alone?

A. I don't think so. I think the cub would be probably in the way and what little work he would do wouldn't certainly advance the movement of the train.

Q. Does it require any experience to unload freight?

A. Oh, yes sir.

Q. And to handle two-wheelers?

A. That is the reason we put men out there to cub for this business, to get that experience.

Q. In handling those two-wheelers, two wheel trucks that haul freight in and out of box cars?

A. That is right.

Q. Now, these cubs are given a schedule—you know that, don't you?

A. It is my understanding they are.

Q. And they are asked to follow that schedule of runs, are they?

A. I don't know just what the request is about that but it is my understanding that they are not held to that schedule.

Q. But if they miss one of the days on the schedule they give them another day at the end of it, you know that?

A. Yes sir. They may go and come at their own volition. They are not required to confine themselves to the runs specified on the schedule, if there is such a schedule.

Q. Well now, Mr. McWhorter, you know of your own knowledge that these men are given a schedule of runs, about fifteen or twenty different runs that they are asked to make during their training period, don't you?

A. But I repeat that they are not required to follow that schedule.

Q. They are given that schedule?

A. I understand that they are.

Q. And if they miss a run on that schedule they are given another run at the end, are they not?

A. I don't know about that.

Q. You don't know about that?

A. Whether they go on that run later on or what.

Q. Now, you also stated, Mr. McWhorter, that these trainees, these cubs are not held to rules. Do you have operating rules on the railroad?

A. Yes.

Q. What are some of them, just for example? Give us an example.

A. Oh, there are several operating rules. I don't know that I could quote them verbatim, but certain rules with respect to proper protection of your train when such protection is needed, and the regulation of speed through yard limits and various things of that sort. The rules are designed for the safety of employees and the traveling public. There are many of them.

Q. Well, these rules are with regard to the operation of the train, are they not?

A. Operation of the train and the railroad, yes sir.

Q. And the protection of the train, is that right?

A. Yes sir.

Q. Now, these rules apply whether there is a cub training with the crew or not, do they not?

A. You mean it applies to the regular train crew?

Q. Apply to the operation of the train, do they not?

A. No, I wouldn't say that because a cub couldn't comply with the rules unless he understood them and had been examined on the rules.

Q. But the rules with regard to protecting the train apply whether there is a cub on the job or not?

A. They apply to the members of the crew, the regular crew on that train. That is, engineer, fireman and conductor, and in the case of a freight train, to the brakemen.

By the Court:

Q. Well the cubs have to observe the same rules that apply to the regular crew, don't they?

A. Well, as far as they know them they would observe them. As far as the operating rules are concerned they wouldn't know them until they had been examined on them.

By Mr. Jansen:

Q. But for their own personal safety and for the safety of the other members of the crew, cubs have to observe the same rules with regard to safety as the other members of the crew?

A. Well, he would have to observe safety insofar as he knew what safety was but I wouldn't say that they observe them insofar as the rules require because they don't know the rules.

Q. If a man were cubbing and the flagman sent him back with the flag he would not be free to come and go or walk off and refuse to stay back there, would he?

A. I don't know just what sort of understanding he might have with the man that sent him back. The regular flagman has no right to send him back to protect the train. If he does he is just doing it of his own volition and without our consent or knowledge.

Q. Do you have certain instructions that you give employees with regard to training cubs?

A. No, nothing except a permit authorizing the cub to ride their train and tell them about the work, etc. and safety.

Q. And your permit, as you call it, tells the train crew not to permit the cub to indulge in any danger practices, does it not?

A. I don't know that it says that. I just wouldn't know. It may and may not.

Q. What you meant when you said the cub was not required to follow the rules was that if anyone was disciplined because of a violation of the rules the cub would not be included in the discipline. That is what you meant, isn't it?

A. Well, of course, we have got no control over cubs to make them comply with the rules or to administer discipline. They are just not members of the crew.

Q. You don't really answer my question. If something happens and a cub is on the crew, you don't discipline the cub, is that what you mean?

A. No, I don't discipline a cub.

Q. Would you hire him?

A. What do you mean, hire him?

Q. When he finishes his training?

A. Well, if he was needed.

Q. If he was responsible for what happened you would hire him?

A. I think so. I don't think that we would hold a cub responsible for something that the regular crew was charged with the responsibility for.

Q. Now, Mr. McWhorter, getting along this knowing the road, as a matter of fact, one of the real reasons for requiring a man to go through a cubbing period is so that he knows the road, knows the signals, knows the sidetracks, housetracks and so on?

A. Yes sir.

Q. That is one of the reasons and, as a matter of fact, if a man has been a regular employee for two years running between Nashville and Bruceton and you want him to run between Nashville and Chattanooga and he has never made the run before, you require him to cub, don't you?

A. And he has never been on that division?

Q. And you require him—

A. He would have to go there and learn the sidetracks, signals, stations, etc.

Q. And you require him to cub for at least one round trip?

A. Yes sir.

Q. And if a man comes from another railroad and he has learned signals and how to couple and uncouple cars, or how to fire an engine, and is an experienced fireman or brakeman or switchman, you still require him to cub your road, don't you?

A. Well, yes sir, he would have to cub it to learn the road. He may be an experienced fireman, brakeman or switchman on some other railroad but if he didn't know our railroad and didn't know the signals, stations, sidetracks, etc. and, so on, of course, he would have to cub just the same as if he had never worked for a railroad.

Q. He might have run as a fireman, he might have fired the same kind or kinds of engines on the other railroad, might he not?

A. He might have.

Q. He might be entirely familiar with firing?

A. Still he would have to know the road.

Q. I understand that but I mean as far as actually firing an engine is concerned, if he was a fireman, he might know all about it?

A. The proper firing of a locomotive depends upon a knowledge of the grades, curves, etc. of the railroad.

Q. In other words, if he came to work for your road, your Company, and had fired for another road for five or ten years, he would have to know where the hills were so that he could get up enough steam to get over them?

A. Yes sir.

Q. And he would have to know where the signals were on your road?

A. Yes sir.

Q. He would have to know all those things in regard to your road, its topography, the layout of switches and all of that?

A. Yes sir.

Q. And that is why he would have to cub?

A. Yes sir, and also to familiarize himself with our working conditions and rules, and while practically all railroads have a standard set of rules, they vary in some things due to the local conditions.

Q. And the same is true of a brakeman or switchman?

A. Yes sir.

Q. Now, you have had occasions at times within your knowledge when you have had a man cubbing for brakeman or for fireman where you put him to work because of an emergency and had him fire an engine between one point and another or had him act as actual brakeman between one point and another while he was cubbing, haven't you?

A. I think there have been a few instances of that sort but he was paid the full wage of the regular brakeman or fireman, whichever the case might be.

Q. And the next day he went back to cubbing again if he hadn't completed it?

A. Well, he might have. I just don't know.

Q. Now, do you have the written instructions that you gave to your superintendents about the payment of office help back at the time when the Wage and Hour Act became effective?

A. No. As I said awhile ago, when the Act first became effective we were not putting on any students. That is, you are talking about porters, clerks, stenographers, callers, etc., and all instructions issued with respect to posters for positions of that sort were oral. I haven't any written instructions in my file but it is evidence to me that it was understood because, as I said awhile ago, they would write in occasionally asking for authority to put a student on.

Q. Do you recall any specific time when you gave any oral instructions to your superintendents about the payment of students for office help, for office work?

A. No, I can't recall any specific dates, we have talked so much about those things.

Q. Do you recall that you did have those oral instructions?

A. I am sure I did for the reason, as I say, that they would write me asking for authority to put on a student; otherwise, they wouldn't have known that.

Q. Did they ever write you from Chattanooga asking for authority to put on a student?

A. Yes sir.

Q. Even before—

A. Yes sir.

Q. So you assume that because they asked for authority to put a student on—

A. We have a form known as Form 983 that is submitted to the General Manager by the superintendent seeking authority to put on not only students but any employee and I have several instances where the superintendent of the Chattanooga Division has written me, sending in one of these forms for Murfreesboro, Tullahoma and places where he felt that he would need additional clerks or messengers, and he wanted to put them on and train them. I have a number of such requests in my file in the office.

Q. What was said about paying them?

A. Well, the forms specify the hourly rate and they were instructed that they could put them on and pay them the hourly rate provided for by the Act.

Q. Then for any man who is put on as a student at any one of these places the superintendent would first have to ask for permission?

A. Yes sir.

Q. And then you would give him permission and instruct him to pay him at the hourly rate?

A. Well, if I felt that he needed or would need additional employees of that kind, I would approve the form authorizing him to put the student on.

Q. Well, with regard to all these employes on the Chattanooga Division did you, in each instance, instruct them to pay them the hourly rate?

A. Every time, and they would send the Form 983. The superintendent's office does.

Q. Was it your contention that they didn't send the form with regard to all these people who were not paid?

A. In Chattanooga?

Q. Yes sir.

A. That is true until after this lawsuit was filed.

Q. So you didn't have any hard and fast rule requiring them to ask permission?

A. Oh yes, yes sir. They have no authority to put anybody on the payroll without an approved form, which must not be approved by me but by the president.

Q. How do you account for that Chattanooga situation?

A. Just a mistake is all. Just somebody overlooked something.

Q. You mean they didn't put them on the payroll and, therefore, they didn't have to ask for your permission?

A. Well, they didn't ask and they should have asked.

Q. Well, as long as they didn't put them on the payroll they didn't have to ask for your permission?

A. They had no right to put them on without authority from me, yes sir.

Q. You say as far as you know the Cravens Yards is the only place where this happened?

A. As far as I know. There may have been others, and if they have come to my attention, they have been paid.

Q. Have all the people in the Cravens Yards been paid?

A. As far as I know.

Q. Did you have any occasion to check it?

A. I have authorized that they be paid.

Recross Examination,

By Mr. Whitwell:

Q. Just two or three other questions. Something was said—I believe you said that on some few occasions a person who was on a train as a cub would take the place of a regular employee for the remainder of that run. Now, would that be a case of emergency, for example, such as where the regular brakeman got sick and had to get off or the regular fireman had to get off and the man who was on there cubbing would finish that run. Is that what you had reference to?

A. That is the situation exactly. It would only be done in cases of emergency.

Q. In such cases as that, I believe you said, for that trip or whatever he did in the regular man's job he was paid the regular contractual rate applicable to that job?

A. That is right.

Q. Is that understood by the representatives of the

trainmen's organization and approved by them in these emergency cases?

A. I think it is, yes.

Q. Now if a train were to leave a terminal such as Nashville and a regular brakeman were called and for some reason he did not show up, would he be replaced by a cub or would you call another man on the list next out, a regular man to take his place?

A. Well, the next man out, that is, on the extra list. The first man out on the extra list under those conditions would be called to fill that vacancy.

Q. And out on the line of road in a case of emergency such as you speak of, if the fireman had to get off by reason of being sick and if there were a regular fireman, employee, riding on that train, dead-heading, would he be called instead of the cub?

A. Oh yes, we would use him instead of the cub, or if it is at a station where the regular man might get sick and have to be relieved.

Q. Now, just a question about this extra man or more than a two-man ground crew in switching operations, I believe you stated that so far as you know Mr. Hall's statement there might have referred to hump crews.

A. That would be my guess. It would be a guess only.

The Court: What are you talking about, the president's statement?

Mr. Whitwell: Yes, sir.

The Court: He is not on the stand.

By Mr. Whitwell:

Q. Now, Mr. McWhorter, if you had a situation where more than two switchmen were needed would the third man be drawn from the list of regular employees?

A. Yes sir.

Q. He wouldn't be a cub then, would he?

A. If he were a regular member of the crew he would get on the job by bidding in the place, which he filled, and if he is not a regular member he would be called from the regular extra board of regular employees.

Q. Just one question about the rule proposition. If a

rule is violated, an operating rule is violated, is it some member of the crew that is held responsible for the violation of that rule and not the cub?

A. Yes, some member or probably all members might be involved, that is, the regular crew but not the cub.

Q. And the cub has no duty or responsibility in reference to seeing that rules or operation of the train are observed?

A. None whatsoever.

Q. And is not held accountable by way of discipline or otherwise for any violation of an operating rule in connection with train operation, is that right?

A. That is right.

Further this witness saith not.

(Recess.)

The next witness, JOHN HENRY CHILDERS, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your name is John Henry Childers?

A. Yes sir.

Q. How old are you?

A. Forty six.

Q. Where do you live?

A. Chattanooga, Tennessee.

Q. How are you now employed?

A. The NC&StL Railway.

Q. How long have you been employed by that Railroad?

A. I believe it was in November, if I am not mistaken, when I went on a regular job.

Q. What kind of a job do you have with the Railroad?

A. I am utility clerk.

Q. Have you been utility clerk all the time that you have been on regular?

A. No, I was yard clerk for, I would say, about three months.

Q. Now, Mr. Childers, before you went on regular did you have to go through a cubbing or posting period?

A. Yes sir.

Q. Do you recall when you went to apply for a job with the NC&StL Railway?

A. Well, it was the latter part of February in 1944.

Q. What had you been doing before that time?

A. I had been working at a textile plant, at Koosa Thather.

Q. What general experience had you had? Had you had any office experience before going to apply for a job with the Railroad?

A. Yes sir. Not in that line, but I had worked in an office off and on for, I guess, for twelve or fifteen years, you know, just in and out.

Q. What kind of office work?

A. Shipping.

Q. Now, do you recall going to the NC&StL and applying for a job?

A. Yes sir.

Q. Do you recall the date?

A. I don't recall just the date, but it was in February, though, the latter part of February, around the 17th or 18th.

Q. Of February, 1944?

A. Yes sir.

Q. When was it you went on regular?

A. I believe it was in November, 1944.

Q. Now, who did you talk to at the Railroad when you applied for a job?

A. Mr.—

The Court: Now, Counsel, isn't it just a question of whether he is being paid in accordance with the Wage and Hour Act? Isn't that all there is to this?

Mr. Jansen: Yes sir, but if it please the Court, I think the Court should have a full and complete picture.

The Court: I don't think it concerns me as to who he talked to down there. The question is: is the Wage and Hour Law being complied with. That is all. Just ask him the pay he gets.

Mr. Jansen: Do I understand that the Court objects to my asking the witness the circumstances of his employment?

The Court: I think your last question is entirely immaterial, and I am saying for your general guidance and information that the question here is, the issue is, whether or not this man is receiving pay in accordance with the Wage and Hour Act, and that is all there is to it.

Mr. Jansen: Note an exception.

The Court: And you need not bother with noting any individual exceptions. In my court you have an automatic exception to every adverse ruling.

Mr. Jansen: Thank you.

The Court: All right; go ahead.

By Mr. Jansen:

Q. When did you first start drawing pay from the NC&StL Railway?

A. I couldn't say positive but I began working some the first part of March, around the 4th or 5th of March, I believe, was the first day that I worked.

Q. Now, you said you went through a cubbing or posting period.

A. Yes sir.

Q. Will you tell us what you had to do and how you did that?

A. On different jobs I would cub on I would stand around and watch the man on the job and after I began to get a little acquainted with it I would do a little work along. In other words, the regular man would be doing something there that he could turn some of it loose to me, you know, and I helped him a little. I mean in order to learn it, you know.

Q. Did you cub—

By the Court:

Q. You are an office employee, are you?

A. Yes sir, that is right.

The Court: All right, go ahead.

By Mr. Jansen:

Q. Did you cub or post more than one job?

A. Well, yes sir.

Q. How many different jobs?

A. Two or probably three a little. A little on three, I believe.

Q. Three different jobs?

A. Yes sir.

Q. Which jobs were those?

A. Well, train clerk and yard clerk and it seems like a day or two on the record job.

Q. Recording, the record job?

A. That is right.

Q. Now, how long did you post or cub on the yard clerk job?

A. Well, I didn't cub so much. I think probably two or three days.

Q. Was that the first job that you posted on?

A. No sir, the train clerk job was the first one.

Q. Let's take the train clerk job—how long did you cub or post on that job?

A. Well, I didn't keep any record of it but I believe it was five or six days.

Q. Five or six days?

A. Yes sir, maybe seven, five or six or seven days, something like that.

Q. Something like that?

Q. Were those six consecutive days?

A. Yes sir, I believe they were. I might have missed one, maybe one day.

Q. How many hours a day did you post on that job?

A. Well, as a general rule I would come in for eight hours and one or two of the days I might have stayed ten in order to get some experience, you know, and understand it.

Q. Well, will you explain a little more about how you happened to stay ten hours?

A. Well, you see, as a crew would change—sometimes it wouldn't be so busy and then, you know, maybe the next man that came on, he could explain to me and help me out

some, you see, and I would stay with him probably an hour or so.

Q. What kind of work does a train clerk do?

A. Well, he just writes up bills, you know, on a train sheet, itemizes it on the train sheet for the train to go out.

Q. You mean he itemizes the bills covering various shipments included in that particular train?

A. That is right.

Q. What else does he do?

A. Well, he works that train out but like when the bills come in, why, he has to cut out the cars, you know, that comes out from Chattanooga and shoot those on through that go on through. Like they are coming out of Nashville and going toward Atlanta, of course, the Chattanooga cars are cut out there and he works those out and transfers them, makes transfer to their destination wherever they go.

Q. When did you start filling out these train sheets, the first day you posted?

A. No, I wasn't familiar enough with them for two or three days to do that.

Q. How long after you first started posting did you start filling out these train sheets?

A. Well, it seems like I wrote on some maybe the third or fourth day I was there.

Q. And from then on did you every day fill out train sheets?

A. Yes, in and out some.

Q. And followed through the routine?

A. Yes sir.

Q. You did some of the work and the regular man did some?

A. Yes sir, when he would have time to let me sit down there.

By the Court:

Q. Just a minute. What did you say your name was?

A. Childers, J. H.

Q. When did you go on the NC&StL Railway payroll as a regular employee?

A. If I am not mistaken, it was in November.

Q. November, 1944?

A. Yes sir.

Q. Now, prior to that time you were posting, a trainee, while you were in training?

A. Well, yes sir, I worked as an extra man.

Q. Well, before you qualified, before you went on the regular payroll?

A. Oh, on the regular payroll?

Q. Yes. When did you go on the regular payroll as a regular employee?

A. Well, I don't know exactly when I went on the regular payroll.

Q. Well, during this training period that you put in then, did you get any pay for that?

A. Yes sir, I think I worked some about March 4th or 5th.

Q. Well, at what rate were you paid for this training work?

A. What rate?

Q. Yes, how much pay did you get for that training work?

A. Well, whatever that job paid, you know. It was around pretty close to $7.00 a day.

Q. For how many hours?

A. Eight hours.

Q. Well, that would be $7.00 a day for eight hours would be about eighty cents an hour, wouldn't it?

A. Yes sir, it run around 87 cents an hour.

Q. All right, did you get that pay during all that training period?

A. Yes, when I would be working the job.

Q. In other words, was there any time when you were training down there that you didn't get paid for?

A. No, when I was working, that is, in other words, working the job I got that rate of pay.

Q. You got that rate of pay all the time?

Mr. Jansen: Let me explain, if the Court please. I think the Court has gotten the wrong impression.

Q. While you were training you put in a couple of days as regular man, is that right?

A. That is right.

Q. And that is what you were paid $7.00 a day for, is that right?

A. Yes sir. You see, you don't have to be a regular man. If you are just an extra man you draw just as much as that regular man does.

Q. When you are on a regular job?

A. When you are on a regular job.

Q. Filling in for the regular man?

A. That is right.

Q. But you didn't fill in for the regular man through this whole period of training, through the posting period?

A. No. To make you thoroughly understand it, like a man would be out today and I got to work, like the first day I worked there was a man out and I worked after I had cubbed eight or nine days.

The Court: That is not what we are talking about. I told you a while ago when you were in training down there or posting—is that what you call it, Counsel?

Mr. Jansen: Yes sir.

The Court: Is that what your understanding of it was?

Mr. Jansen: Yes sir.

By the Court:

Q. When you were posting, in training, going around with somebody else learning the job did you get any pay for that time?

A. Oh, no sir, I didn't get any pay for that until I worked on the job.

Q. You didn't get any pay until you worked on the job?

A. That is right.

Q. Well then, you got pay from then on?

A. I didn't get any pay at that time. That was the understanding. I was supposed to learn the job.

Q. When you were learning the job did you get pay or not, for the time you put in when you were going around

with somebody else learning the job—did you get any pay for that?

A. No sir, not at that time. I did later on.

Q. What do you mean by "later on"? That they sent you a check to cover that time?

A. Yes sir.

Q. Then you have been compensated for that, have you?

A. Yes sir.

Q. At the time you did it they were not paying but later on they sent you a check to cover it?

A. Yes sir.

Q. And at this same rate of 87 cents an hour?

A. No, it was paid for at about the rate of 40 cents an hour, I believe it was.

Q. But the Wage and Hour scale?

A. Yes sir.

The Court: All right.

By Mr. Jansen:

Q. Do you know whether you got paid for all the hours you spent posting?

A. Well, no, I couldn't say. I don't know for sure that I did.

Q. Do you have any way of knowing whether you got paid for all the hours you spent posting?

A. As long as I didn't keep any record I couldn't say.

Q. How much did you get?

A. Well, my check was $28.80.

Q. Did that show what the face amount of it was? There were certain deductions on that check, weren't there?

A. Yes sir, that was the total amount, $28.80.

Q. That was the total amount of the pay that they gave you for the time that you were posting?

A. Yes sir.

Q. Now, can you tell us—you say you spent six or seven days posting for yard clerk?

A. Train clerk.

Q. And how many hours a day?

A. Eight hours a day.

Q. Oh, not all of those days were ten hour days?

A. Well, some. There was one or two of those days ten hour days, about ten hour days.

Q. And then how many days did you post for yard clerk?

A. Well, I would say two days, maybe two days, maybe a little over, not much over two days.

Q. How many days did you post for the third job, record clerk?

A. Well, I worked, all-told, about fourteen hours on the record job.

Q. Fourteen hours?

A. Yes sir.

Q. And the two days you spent on the yard clerk job, how many houre a day was that?

A. Eight hours.

Q. Did they give you any explanation with the check that they gave you for $28.00?

A. Yes sir, they said that was a check for my cubbing when I first came there.

Q. Did they explain the number of hours that that covered?

A. Well, I don't believe so.

Q. How long after you had done your cubbing did they give you that check?

A. It was sometime the first of this year.

Q. The first of 1945?

A. Yes sir.

Cross Examination,

By Mr. Whitwell:

Q. Mr. Childers, just two or three questions. If I understood you correctly, you did this posting at Chattanooga, Tennesee?

A. That is right.

Q. Now, if I understood you correctly, the first posting that you did was for the position as yard clerk over there in Chattanooga?

A. No, train clerk.

Q. And you think you posted maybe five or six days for that?

A. Yes sir, maybe seven. It would run around six or seven days.

Q. But you are not certain; you have no record to show definitely?

A. No, I didn't keep any record and I don't know positively.

Q. And then after completing your posting for that you were employed as extra man for the job of train clerk?

A. Yes sir, sometime. I expect I had been there something like three weeks before I began to work pretty regular.

Q. Then you posted, I believe you said, a period of something about two days for the position as yard clerk?

A. Yes sir.

Q. And you posted a few hours, I believe you said about fourteen hours for the position as record clerk?

A. Yes sir.

Q. And these periods of posting were with a view of your having a position, one kind for one kind of clerk and another for another kind of clerk and another was still a third kind of clerk?

A. That is right.

Q. And back at that time that you did that posting you were not paid but you were paid somewhere around the first of this year for the days and time that you spent posting for these different positions, is that right?

A. Yes sir.

By the Court:

Q. You say that that pay was at the rate of 40 cents an hour?

A. Yes sir, it figures about the rate of 40 cents an hour.

Further this witness saith not.

Testimony of Curtis Bomar

The next witness, CURTIS BOMAR, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your full name is Curtis Bomar?
A. Yes sir.
Q. How old are you?
A. Thirty-six.
Q. Where do you live?
A. Fayetteville, Tennessee.
Q. Are you now employed? How are you employed?
A. As agency clerk.
Q. With whom?
A. The NC&StL Railway.
Q. Are you employed at Fayetteville?
A. No, sir.
Q. Where are you employed?
A. Murfreesboro, Tennessee.
Q. How long have you been employed as agency clerk for the NC&StL Railway?
A. About seventeen months.
Q. About seventeen months?
A. Approximately, yes, sir.
Q. And before you were employed as agency clerk with the NC&StL Railway were you required to do any period of posting?
A. Yes, sir.
Q. And where was that?
A. At Fayetteville.
Q. Were you working at the time?
A. Yes, sir, I was employed—I had been employed by another company.
Q. What company was that?
A. Elk Cotton Mill.
Q. Had you ever had any office experience before going with the NC&StL Railway?
A. Yes, sir.
Q. Will you explain what that was?

A. I was bookkeeper in the First National Bank in Chattanooga.

Q. Any other?

A. And bookkeeper for a motor company.

Q. Do you remember the name of the company?

A. Smith Motor Company.

Q. Where was that located?

A. Fayetteville. They were at that time.

Q. Now, how many hours a day did you put in this time posting at the NC&StL Railway?

A. Well now, I was very irregular on that. When I applied for a position it was—I was told I had to post and I could post at my convenience, at any hours that I wished to, so I did, and sometimes I would come to work around 9:00 o'clock of a morning or 9:30 and work until about 1:00 or 2:00.

Q. Did you do that every day?

A. Well, five days a week.

Q. Five days a week?

A. Yes, sir.

Q. And who was your superior there?

A. Mr. Dave Buchanan, the agent.

Q. And is that located anywhere near the Cravens Yards?

A. No.

Q. And for how many weeks did you continue to post from around 9:00 o'clock in the morning until 1:00 o'clock in the afternoon five days a week?

A. Well now, I couldn't say exactly because I didn't keep any record of it.

Q. Well, do you have a recollection of it, approximately?

A. I began in August, around the first of August and until around the middle of October.

Q. Did you ever receive any pay for that posting period?

A. No, sir.

Q. Have you ever to now received any pay for it?

A. No, sir.

Q. Now, what kind of work did you do when you were posting?

A. Well, it was billing and expensing and checking freight.

Q. Well, explain this billing a little bit. Tell us how you did that.

A. It is billing out the shipments to the destination, the route and the rate, amount of freight.

Q. Did you do that work yourself?

A. Yes, sir.

Q. While you were posting?

A. Yes, sir.

Q. Did someone help you with it?

A. Yes, sir.

Q. Who was that?

A. The operator-clerk; he showed me.

Q. Did he do some of the billing too?

A. Yes, sir.

Q. Now, what is this checking you spoke about?

A. That is checking freight from the boxcar, freight designated for this station.

Q. How did you do that?

A. Well, we check that from the waybills.

Q. Where did you go to do that?

A. You go to the freight car.

Q. Did you have the waybill with you?

A. You have to have the waybill with you to check this off and tell the porter the number of pieces that you want out of this car for this station.

Q. Who carries it out?

A. The porter.

Q. You check it off and tell him what to take out and he takes it out?

A. Yes, sir.

Q. Did you do that all during this time you were posting?

A. I helped do it.

Q. Did anyone else do it?

A. Yes, sir.

Q. At the same time you were doing it?

A. No, sir.

Q. You would do it one time and somebody else do it the next time?

A. No, to start off with the operator gave me an outline of it and then I caught on to the work. I went on then a while and went to doing some more work.

Q. How long did it take you to learn the outline of it and how to do it?

A. Well, I am still learning.

Q. I know, but before you did it yourself?

A. You mean did all of that particular job?

Q. Checking, yes sir.

A. Well, I will say two mornings that I was there, in the morning, and I would say I started on the third morning.

Q. From then on you did the checking more or less by yourself?

A. Off and on, yes sir, not regular.

Q. I understand. What else did you do beside billing and checking?

A. Making expense bills for the freight that came in for the customers.

Q. Did you do that by yourself during this posting period?

A. Some of it I did, yes sir.

Q. Off and on as the posting period went on?

A. This man though, he would tell me. If I got something that came in that I didn't know anything about he would tell me—I would stop and ask him what to do and he would tell me.

Q. I assume there are times you do that even now?

A. Yes, sir.

By the Court:

Q. Well, was anybody else there regularly to perform all those duties you were allowed to perform?

A. Yes sir.

Q. There was a regular man to carry on those duties?

A. Yes sir.

Q. And you were learning to take his place, I suppose?

A. By helping him, yes sir, or he was helping me, rather.

Mr. Jansen:

Q. Is that the same kind of work you are doing now?

A. Yes sir, the same work.

Q. What difference is there, if any, between what you do now and what you did when you were posting?

A. Well, practically nothing; practically no difference but naturally I am more efficient now than I was when I began.

Q. And you became more efficient as time has gone on?

A. I know more what I am doing now. Back then I was just blind. I didn't know what I was doing.

Cross Examination,

By Mr. Whitwell:

Q. Mr. Bomar, I believe you stated that you posted or trained there at Fayetteville irregularly for the job that you were seeking to learn, the position that you were seeking to learn so that you could later become an employee?

A. Yes sir.

Q. You understood when you went down there to post and train that you were training for your own benefit to learn a job that paid good wages, didn't you?

A. Yes sir.

Q. You were doing that for your own benefit, weren't you?

A. Yes sir.

Q. There was a regular man you call the operator-clerk there, who was regularly employed and paid to do everything that you did in furtherance of your learning the duties of the job that you wanted?

A. That is right.

Q. And a lot of the time, I take it, in learning that you were more or less in the way; you had to be instructed by him and told a lot of different things?

A. That is right.

Q. Is that true?

A. Yes sir.

Q. And I assume that this regular employee there was very nice to you and he took time off, especially in the beginning, to teach you how to check bills and do the different things that you just related to Mr. Jansen?

A. That is right.

Q. And during that time that he was training and teaching you it was at least slowing him up, wasn't it?

A. Yes sir, I would think so.

Q. You didn't consider that the Railroad gained any benefit by what you may have done there while you were learning to do the job that you later wanted, did you?

A. I couldn't see how they could.

Q. Were you employed anywhere else? I believe you say you were bookkeeper for one or two concerns?

A. Yes sir. No, at that time I was employed at a textile mill but this was later, I mean, over there back than the present time.

Q. What year was it when you took this training there under this regular man?

A. You mean posting for this railroad job?

Q. That is right.

A. That was in 1943.

Q. During the time that you were posting there irregularly, you say, did you have a job elsewhere?

A. Yes sir.

The Court: He worked for the cotton mill.

Mr. Whitwell: I thought I understood him but I was afraid I didn't.

Q. And then during your time off from your regular job you would come over there and post at your leisure?

A. Yes sir.

Q. And came when you desired?

A. Yes, sir.

Q. And left when you desired?

A. That is right.

Q. You might post some days two hours and some days you might post five?

A. No, as a general rule when I came on I worked fairly regular hours.

Q. Of course, you understood that you were not employed at that time?

A. Yes, sir.

Q. And it was more or less left up to you to decide when you had learned the job to your satisfaction?

A. No, it wasn't left up to me to know when I had learned the job.

Q. Do you know now, Mr. Bomar, how many hours or how many days you posted over that period?

A. No, I haven't any idea. As I said before, I didn't keep any record. I know approximately. I guess I could give it to you by figuring it up, sitting down and taking the calendar and figuring it up. That would be the only way.

Q. Do you know whether or not, Mr. Bomar, any voucher has been recently issued to cover such time as you spent there posting?

A. No, sir, I don't know of any, if it has.

Q. If that can be ascertained and a voucher issued to cover the period while you were posting there at the rate of at least forty cents an hour, will that satisfy you all right?

A. There is no question of satisfying me because it was a trade to start off with. There was no question on that.

Q. Just you were there training and learning?

A. Yes, sir.

Q. And weren't thinking about money while training?

A. That is right. It was a benefit to me on account of the future job or position.

Q. Now, after that you did get employed. I believe you say you are now employed as clerk at Murfreesboro?

A. That is right.

Q. What is your rate of pay?

A. $161.00 and some few cents a month.

Q. For how long have you been drawing that or some similar rate of pay?

A. December 14th—from December 14th, 1943.

Q. Now, I am not sure that I followed you. After you completed your training period there at Fayetteville did you have a job as clerk somewhere else with the Railway before you went to Murfreesboro?

A. Yes, sir.

Q. Where was that?

A. Well, now, there were two or three different places on the line. You see I was an extra man. I was on the extra board, extra clerk. I was first employed at Sherwood.

Q. Where you would be switched to would be according to where you stand on the roster, the seniority roster and be called?

A. No, sir, where I might be needed. You see, I understood at that time I was the only man on the extra board.

Q. Now, at these different places was your rate of pay comparable with what you are getting at Murfreesboro?

A. Yes, sir, it was the rate of pay for that job or that position, either one you call it.

Q. Will you undertake to estimate and figure out as best you can the time that you actually put in there at Fayetteville for this job and give it to me?

A. Well, I couldn't say off-handed because I don't know the number of days. You see, there are some Saturdays I worked there, just depending on the job, I mean how much work was in the office. I always came down on Saturday to get experience.

Q. Will you assist the accounting department, if it happens to not have an accurate record of your time you spent, assist them and aid them in working up the exact time?

A. Yes, sir, I will do everything I can.

Mr. Whitwell: Thank you, sir.

Redirect Examination,

By Mr. Jansen:

Q. Where was it you worked on the extra board?

A. Sherwood and Cowan.

Q. And when did you do that? Before you went in the army or after?

A. Well, this was after I had been turned down for service.

Q. Or before you went up for your physical examination?

A. Yes, sir.

Q. Was anything said to you while you were posting about when you were going to get to work?

A. No, sir, not off-handed.

Q. Did you ever ask anybody about it?

A. Well, the agent and I discussed it and he said that he had wrote to the chief dispatcher about it but hadn't heard anything.

Q. How long after you had started posting was that?
A. Approximately about three or four weeks.
Q. Approximately three or four weeks?
A. Yes, sir.
Q. And he had written to the chief dispatcher, you say?
A. Well, that is the impression that I received.
Q. Did he tell the man you were working under?
A. I just couldn't say but that was the impression that I got, that he did.
Q. You say you talked with him?
A. I talked with the agent.
Q. Talked with him perhaps more than once about it?
A. Yes, sir.
Q. And he gave you the very definite impression after about three or four weeks that he had written to the chief dispatcher, is that right?
A. Yes sir.
Q. How long after did you continue to post, after that time?
A. Well, it was sometime the first or around the first of October that I was offered a job with the NC&StL Railway, now, a regular job.
Q. What date would it be with reference to the three weeks after when the dispatcher said he had written in; when would that be?
A. Well, it was after the first of October. I couldn't say when.
Q. Now, when the dispatcher had written what did you do?
A. What do you mean, written in?
Q. And when you talked with the dispatcher?
A. I haven't talked to the dispatcher.
Q. With the Company?
A. With the Company, you mean?
Q. Yes sir.
A. Will you repeat that question?

The Court: You have gotten him where he don't know where he is going.

Mr. Jansen: I am afraid so.

Q. You say you talked with the agent and he said he wrote the dispatcher?

A. Yes sir.

Q. What month was that?

A. Along in the latter part of August or the first of September.

Q. And you heard nothing further until October?

A. Yes sir.

Q. And then you were offered a job.

A. Yes sir.

Q. And during the time after the agent had said he had written to the dispatcher you continued to post on every day?

A. Every week day.

Q. And that was five days a week?

A. Yes sir.

Q. In fact, during the whole posting period it was five days a week?

A. Well, now there was some Saturdays I spliced in. I don't know exactly how many because, as I said awhile ago, I didn't keep any record and I have no way of knowing but I did work some Saturdays.

Q. You mean in addition to five days you worked on Saturday also?

A. Yes sir.

Q. A few times?

A. Yes sir.

Q. Were your hours at the mill regular?

A. Yes sir.

Q. What time did you start there?

A. 3:00 o'clock.

By the Court:

Q. When did you go on as a regular employee?

A. You mean with the Railroad?

Q. Yes sir.

A. It was December 14th, 1943.

By Mr. Jansen:

Q. Now, when you were offered this job in October, did you take it?

A. I tried to.

Q. And what happened?

A. My employer at that time didn't want to release me.

Q. Did you continue posting then?

A. Off and on. It became more irregular after that.

Q. From the first of October the posting was more irregular?

A. Yes sir.

Q. Have you ever been paid for any of that time?

A. No sir.

By Mr. Whitwell:

Q. Mr. Bomar, you don't think you posted too long, do you?

A. No sir, I don't.

Thereupon a recess was taken to 1:30 for lunch.

Afternoon Session.

CURTIS BOMAR recalled for further examination, testified as follows:

By Mr. Jansen:

Q. Mr. Bomar, at my request did you figure up the hours that you spent cubbing without pay for the NC&StL Railway?

A. You mean—

Q. During the noon recess?

A. I tried to, as best I could, figure it up.

Q. As best you could remember. To the best of your recollection do you have the total number of hours that you spent cubbing?

A. Yes sir.

Q. And what is the total number of hours?

A. Well, roughly speaking, it is 320 hours. I am not positive of it, that that is right.

Q. Well, have you got it divided in any way?

A. Yes sir, the best I could.

Q. Well, explain how you arrived at that 320 hours. I notice you have a piece of paper in your hand and I find figures on it starting with 90.

A. Well, during August the first three weeks that I worked I figured five hours a day, six days a week and

that would be, of course, 30 hours and three times 30 is 90.

Q. Then next.

A. The next week would be, I figured, 25 hours a week.

Q. How many days would be involved in that?

A. Five days.

Q. Not Saturday?

A. Yes, sir, as best I can remember.

Q. Go ahead.

A. And two weeks would be 50, and then the next two weeks 60. 30 hours a week for those two weeks—it would be 60.

Q. What is the difference between this two and the previous two?

A. Well, there was something came up there, I suppose, I wanted to learn.

Q. I mean was there another day involved?

A. Well, Saturdays involved in that.

Q. Those two weeks included Saturdays?

A. Yes, sir.

Q. All right.

A. Then the next two doesn't include Saturdays and would be 50 hours. And then that was at the point, as well as I remember, that I was offered a regular job, and the next two was 20 hours per week, apiece, which would be 40 for the two weeks, and then just roughly speaking for the rest of the time up in November was 70 hours, making a total of 320 hours.

Q. And up to now you haven't been paid for any of that?

A. No, sir.

Cross Examination,

By Mr. Whitwell:

Q. Mr. Bomar, just two or three questions. Of course, you don't pretend that these figures you give here are accurate at all?

A. That is right.

Q. They are just collected more or less from memory?

A. That is right.

Q. I believe you stated this morning that in October,

1943 you were offered a job and the company with whom you were employed at that time wouldn't release you.

A. That is right.

Q. And you couldn't accept this railroad job at that time?

A. That is right.

Q. Now, you went ahead, since you couldn't accept the job at that time, you went ahead for your own benefit and on your own accord and posted or trained on from time to time up until the time there was a job open for you and you accepted it in December, 1943?

A. Yes sir. Well, the reason of this space in there, I was called to the army for a physical and I could have begun sooner than December 14th if I wasn't expecting the army to call me and I didn't want to begin working and then have to quit.

Q. But it wasn't any fault of the Company that you didn't get to work earlier?

A. No sir.

Q. Now, before October 18th, 1943 wasn't it your understanding that there wasn't any job open; that the jobs were filled and, therefore, you posted on, trained on, and there was no job open for you, and that you wanted to keep running along until such time as there would be a job open for you?

A. That is right.

By Mr. Jansen:

Q. Mr. Bomar, do I understand that the reason you kept cubbing was because they had no job open for you?

A. Well, at that time I wasn't offered one, now, from August up until October. That is the reason I continued to cub on.

Q. Who told you there was no job open for you?

A. Well, no one. I wasn't offered one. From that I just assumed there wasn't one.

Q. Was that some of the things you and the agent talked about?

A. I don't know. I couldn't say definitely. I suppose so. I don't remember, recall any things to that effect.

Further this witness saith not.

The next witness, CHAS. L. ROSENHIEM, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your name is Charles L. Rosenhiem?
A. Yes sir.
Q. How old are you?
A. Forty six.
Q. Where do you live?
A. Chattanooga, Tennessee.
Q. How long have you been living there?
A. About forty six years.
Q. How are you employed?
A. Pharmacist.
Q. How long have you been a pharmacist?
A. About twenty years, I guess.
Q. Are you a graduate of a pharmacy school?
A. Yes sir.
Q. Were you ever employed by The NC&StL Railway?
A. Yes sir, I was.
Q. When was that?
A. I worked nine days for pay about May 20th, I think, last year.
Q. Nine days for pay?
A. Yes.
Q. Did you work any days without pay?
A. About six to eight weeks. I don't remember the exact date on that.
Q. Have you ever been paid for those six to eight weeks?
A. You mean cubbing?
Q. Yes sir.
A. Not yet.
Q. Now, tell us what kind of job it was that you cubbed for?
A. Well, I was cubbing for train clerk, record clerk and yard clerk.
Q. Three different jobs?
A. Any one I might qualify for.

Q. Did you cub for the three different jobs at the same time?

A. I cubbed ninety percent of the time for record clerk because I found out I couldn't qualify for the other two.

By the Court:

Q. They usually call that posting, don't they?

A. Record clerk is posting records, I guess you might call it.

By Mr. Jansen:

Q. Cubbing is also referred to as posting, is that correct?

A. I don't know.

The Court: I think office employees are called posting and the yard employees or road employees call it cubbing, is that right?

Mr. Jansen:

Well, that was my understanding but apparently—

Q. Did you have any understanding about that?

A. Cub is what they called me until I got a job as record clerk.

Mr. Whitwell: My understanding is that persons training for these clerical jobs are referred to as posters. Persons training for train service work are called cubs.

By Mr. Jansen:

Q. They called you a cub?

A. Yes sir.

Q. You were posting for an office job?

A. I tried to get an office job.

Q. I think the last question I asked you about your posting was whether you posted for all three jobs at one time?

A. No, I worked individually on each one.

Q. How came you to start doing this posting?

A. Well, I tried for the train job but I wasn't capable of typing, you see, good enough so I just gave that up. I saw I couldn't type with speed.

Q. What kind of job was that?

A. Train clerk. That requires you to type, you see, and I was kinder slow on the typewriter so I gave that up after two or three days.

Q. And then after two or three days did you talk to anybody about giving it up?

A. No, it wasn't necessary to talk to anybody. I saw I could cub any of the three jobs I liked.

Q. Who had told you that?

A. Mr. Born.

Q. Had you talked with him before you started cubbing?

A. Naturally. He gave me the place.

Q. Was it with Mr. Born that you filed an application?

A. Yes sir.

Q. Did you have to take some kind of examination?

A. No.

Q. Physical examination?

A. No.

Q. After you filed your application with Mr. Born did he tell you what to do?

A. He told me I would have to cub a certain length of time. He told me ten or fifteen days, and I would be placed somewhere.

Q. Who is Mr. Born?

A. I don't know what his title is but he is supervisor, I guess, of the Cravens Yards, I don't know what his title is.

Q. And you say he told you you would have to cub about fifteen days?

A. I would more than likely be appointed in fifteen days to some place if I was capable.

Q. Did he tell you when to come in the morning or during the day?

A. During the period of time he told me if I wanted to, work three of the shifts so I could get the experience on each job.

Q. Can you remember when the shifts started?

A. No, I don't remember the hours. One was in the morning early, another one was in the afternoon and evening and another one was at midnight.

Q. How long was each shift?

A. Eight hours.

Q. Mr. Born had told you he wanted you to work on each one of those shifts?

A. At various times. He told me he wanted me to learn each shift. He said work at different times and not just in the daytime.

Q. Now, you said you had to cub for yard clerk three days?

A. No, train clerk.

Q. I am sorry—for about three days?

A. Yes sir.

Q. Do you remember whether you cubbed different shifts?

A. No, just in the morning for train clerk.

Q. Were you there a full eight hours?

A. I don't know; I think so.

Q. And then what was next?

A. Yard clerk.

Q. How long did you post or cub for that?

A. That is outside work and I liked the inside work better so I gave that up and tried for record clerk.

Q. How long were you posting for yard clerk?

A. You don't post for yard clerk. You go around and check trains.

Q. How long did you cub for yard clerk then?

A. I don't know. It must have been a week maybe, or so; I don't know.

Q. Then did you work on different shifts when you were cubbing for yard clerk?

A. I worked the evening shift and the morning shift.

Q. How many hours a day?

A. Eight hours.

Q. Who told you when to come and when to go?

A. No one told me when to come and go. Mr. Born just told me just pick the shift, so I spent eight hours there.

Q. He had told you which shift to take?

A. He didn't seem to care what shift I took and I preferred to take the morning shift.

Q. Now, then, from yard clerk what was the next job you cubbed for?

A. Record clerk.

Q. Was that inside work?

A. That was inside.

Q. How long did you cub for record clerk?

A. Well, it must have been about four or five weeks.

Q. Every day of the week?

A. I think I was absent one time for about three days. I don't remember exactly the days I did cub.

Q. Outside of the three days absence?

A. I don't think I was absent more than three days in this six or eight weeks I was there.

Q. Were you there every day of the week or away any time?

A. Every day and Sunday work.

Q. Every day, including Sunday?

A. Yes sir.

Q. How many hours a day?

A. Eight hours.

Q. What kind of work did you do when you were cubbing for record clerk?

A. I posted incoming trains and outgoing trains and regular routine, such as—I don't remember now, just regular routine checking different freight trains, all freight trains, you see, that is, the destination and contents and things like that, you know.

Q. How many different kinds of records do you have to make or keep as record clerk?

A. We had one—two large books there we had to write down on with different colored pencils. One was in-going and one was out-going, different colored pencils, you see. We had to write continually for eight hours.

Q. What did you write in the books?

A. Time of arrival and departure and other necessary information.

Q. Did you write anything about what the train was carrying?

A. I just don't remember. I have been out of it about seven months now.

Q. Now, you say you wrote continuously for eight hours?

A. Yes sir.

Q. Well, was that practice work or was that actually doing the work?

A. I was doing the work as an assistant. I was under the other employees.

Q. Did you actually do the writing?

A. I did the writing in the book.

Q. During this period when you were cubbing for record clerk?

A. Yes sir.

Q. Now, did you do any work during that entire period when you got paid for it?

A. I didn't get pay for the cubbing period. I got paid after I was appointed. One of the men took his vacation, the midnight shift, you know, took his vacation and I was appointed to take his place.

Q. When was that?

A. That was the last nine days I worked from about the 18th to the 27th of May, I believe.

Q. The last nine days of this long period when you were cubbing for record clerk?

A. He took his vacation and I took his place.

Q. For how long a period did you take his place?

A. Nine days—nights, it was.

Q. And after that then what did you do?

A. I quit then. He said I would have to go back to cubbing again and I didn't want to start over again because it didn't seem like there would be a vacancy in the record department. The employees had been there so long I didn't think there would be a vacancy.

Q. Who said you would have to go back to cubbing again?

A. I believe they notified me down there I would have to go back to cubbing.

Q. Do you remember who it was?

A. I don't know, Sir.

Q. And you haven't been paid for any time you spent cubbing?

A. I haven't received any money to date.

Q. Now, did you ever speak to Mr. Born about going to work and drawing a salary?

A. Yes sir, about every few weeks, every two weeks or so I would go to him and he just said I needed a little bit more experience and asked me to wait a little bit longer.

Q. Did you do that on more than one occasion?

A. Yes sir, I asked him, I don't know how many times but it was more than once.

Q. Have you asked him with reference to paying you for your cubbing?

A. I haven't made a request, no sir.

Q. Have you seen them about it?

A. I was down there—the way I understood, a friend of mine told me they had some checks down there for us for the back pay so I went down there and asked for mine.

Q. Did you get it?

A. I haven't got it yet.

By the Court:

Q. What did they tell you when you went down there?

A. They told me they would pay me and I understood they was going to pay me. I don't know whether they will or not but they promised to pay me. I gave them my address at home to mail my check but I haven't received the check.

Q. Now, how long ago was it when you worked there as a cub? When was the most recent time?

A. The last time I worked was last May.

Q. 1944?

A. Yes sir.

Cross Examination,

By Mr. Whitwell:

Q. Mr. Rosenhiem, when was it that you went down there to the office of the general yardmaster recently asking for your check, if it had arrived, for the period of your cubbing or training or posting, as you call it?

A. Well, I haven't been down to the yard. I was down at the office, Ninth Street, where the paymaster is.

Q. When did you last ask about that?

A. I guess it has been about a week ago.

Q. You don't know that your voucher is there for you now?

A. I haven't been down there in a week.

Q. Now, Mr. Rosenhiem, when did you first start your training period for the position as train clerk?

A. I don't know the exact date.

Q. Do you know what month it was?

A. I guess it must have been the latter part of March, I don't know, but counting back six to eight weeks from May 20th.

Q. You have no record from which you could tell us when you first began posting?

A. No. I had a separation notice from them but I couldn't find it last night when I got ready to come over here.

Q. So you don't know now what month it was that you started posting for the position of train clerk?

A. No, I don't remember right now. I have been busy for the last seven months.

Q. You don't know exactly how long you did post for that position, do you?

A. Train clerk?

Q. Yes sir.

A. I trained close to about three or four days, I guess. I saw I couldn't qualify for it because I couldn't use the typewriter.

Q. Now, when you were posting for the position as train clerk did the Railroad Company have there regularly employed train clerks with whom you trained?

A. Yes sir, they were there.

Q. And such work as you did while you were posting there those three days was that work that the regular clerk was supposed to do and paid to do?

A. He did his work, yes sir, and he also tried to show me how to do mine.

Q. You were there trying to learn and he was there trying to show you the nature of the work, wasn't he?

A. I did the work—I mean I did it slow, but I did the work. He was supervising.

Q. And he told you how to do it?

A. Yes sir, he told me how to do it. Somebody had to tell me how to do it.

Q. And it was work that he was there to do himself if you hadn't done it?

A. Yes, sir.

Q. Now, I believe you said that after about three days or thereabouts you say you couldn't qualify for that and so you gave that up?

A. Yes sir.

Q. And then the chief clerk there—you wanted to try for the position as yard clerk?

A. Yes sir.

Q. And then you began posting for that position?

A. Yes sir.

Q. And you posted or trained with the regular employee, the yard clerk or yard clerks there, did you?

A. Yes sir. That consisted mostly of walking around the yards checking trains.

Q. But there was a regular man that walked around in the yards showing you the duties of the position of yard clerk?

A. Yes sir.

Q. And he showed you how to make out these records?

A. Yes sir.

Q. And after he had taken time in showing you how to make out certain records then he began to let you make out the records so you could better and faster learn how to do it, didn't he?

A. Yes sir.

Q. And when you were making out those records and learning how to make them out and learning the job you were making out records that the regular yard clerk was there to make out and paid to make out, weren't you?

A. Yes, sir.

Q. And you say you trained there for that position about a week and couldn't make it or didn't like it and you gave that up?

A. I could have made it but I had a rupture and didn't want to do all that walking if I could find an inside job, that is the reason.

Q. Then you gave it up then of your own accord?

A. Pretty well.

Q. And can you tell us what day or what month it was that you began posting or, Mr. Rosenhiem, you call it posting for the position of yard clerk?

A. No, I don't know the date.

Q. Do you know the date that you gave it up?

A. I don't know the date.

Q. Then, Mr. Born told you you had a rupture—

A. I didn't tell him anything about the rupture.

Q. Anyway, you went to Mr. Born and told him you wanted to give up this posting for yard clerk; you wanted an inside job, didn't you?

A. Yes sir.

Q. And then Mr. Born permitted you to train there for the position of record clerk in the office?

A. He told me I would be more capable of making a record clerk than any other position open.

Q. And so then you began training for the position of record clerk there in the office?

A. Yes sir.

Q. Did the Company have a record clerk there with whom you trained and who showed you the different things to be done?

A. Yes sir.

Q. And he took time out and time off in showing you the duties of that job, didn't he?

A. He showed me. It didn't take me long to do the work myself.

Q. Well, such work as you actually did there, was that work that the regular record clerk was there to perform and paid to do?

A. Yes sir, he did the work. I mean he worked but I assisted him.

Q. You assisted him for your own benefit, didn't you, to learn the duties of that job?

A. Naturally.

Q. And that is why you went down there to cub or train was to learn the duties of one or more of these jobs so that you could qualify yourself for a job, isn't it?

A. Yes, sir.

Q. Now, can you tell us, Mr. Rosenhiem, when you first began to train for the position of record clerk there?

A. No, I can't, Sir.

Q. Upon what do you base the statement that you must have trained there some several days or four or five weeks?

A. Well, in various places, and I trained mostly for the record clerk. That is what I liked best. That is what I trained mostly for.

Q. Were you a pharmacist during that time, back in that period?

A. No, I gave up all my work to go to the railroad.

Q. And then it just takes some people longer to learn the duties of a job than it does other people; doesn't it?

A. I don't know; maybe.

Q. Had you ever had any experience of any kind in keeping railroad records or records even similar to the records made and kept by the record clerks before you went down there?

A. I had no experience whatever when I went down there.

Q. Now, the first work you did, you say, was about May 20th, 1944?

A. Last year, yes sir.

Q. And you were doing this training prior to May 20th, 1944?

A. That is the first work I did for pay.

Q. Well, you keep saying "work for pay". Do you suppose that the railroad business there could have gone on without you being training there?

A. Very well, I guess.

Q. I just wanted to be clear about that. Now, Mr. Rosenhiem, you say you went to work about May 20th, 1944 and worked how many days?

A. Nine days.

Q. And at the end of nine days what happened to you?

A. I relieved a man for his vacation on the midnight shift. He had seven days off and he took an extra two days off.

Q. You were really working extra, weren't you?

A. No, I was working, on the payroll.

Q. On the payroll to fill in the place of a man who was absent temporarily?

A. That is the only vacancy they had, yes sir.

Q. Now, after working nine days was it then that you immediately gave up railroad work?

A. Yes sir, I gave it up because I didn't want to start cubbing again.

Q. Now, Mr. Rosenhiem, did this man whose place you took there for nine days, did he come back to his job?

A. Yes sir, he came back.

Q. Then isn't it the truth that when he came back to his job there was no other place for you, no regular job for you at that time?

A. That is right.

Q. And you didn't want to be put in the position of not having a regular job down there, just working extra when a man would happen to be away temporarily from his regular job, and this kind of working extra didn't appeal to you, and since there was no regular job available you just decided to quit?

A. No, I didn't see anything coming up in the near future so I quit.

Q. Now, isn't it a fact that Mr. Born, the chief clerk there, told you when this man came back that he had no regular job for you or a job for you at that time and suggested to you that some more training wouldn't hurt you, and suggested to you that you go ahead and better qualify yourself during the time when there was no job for you at all?

A. No; he didn't say anything like that at all.

Q. Mr. Rosenhiem, when you went down there sometime in 1944 and made application for position as clerk and began your training period I believe you have stated you did it for your own benefit?

A. Yes sir.

Q. And at that time were you promised any compensation whatsoever for your time or for your presence during this training period?

A. None whatever, but I was promised that in about ten or fifteen days I could qualify for a position.

Q. In other words, Mr. Born told you it would take you ten or fifteen days—you look at me—

A. Excuse me.

Q. —to qualify for the position which you sought; that is what he said?

A. Yes sir.

Q. Did he promise you any pay for the ten or fifteen days or whatever it was?

A. No sir.

Q. You understood during that time when you went

down there, during the time that you were training, that you weren't to be paid for the time that you were training, is that right?

A. Well, I was cubbing and I didn't expect anything.

Q. You don't know whether voucher has been issued for you or not?

A. No, I haven't received any.

Q. You will be glad to get it, won't you?

A. I don't know.

Redirect Examination,

By Mr. Jansen:

Q. Mr. Rosenhiem, Mr. Whitwell asked you one question, he said something about it taking one person longer than another to learn something. Now, if I understand you correctly, when you were cubbing for this record clerk you were keeping one or two books, or was it only one book?

A. It was one large book and a group of smaller ones.

Q. How long did it take you to catch on to that work?

A. I did my work efficiently when I was appointed, when the man took his vacation, and that was the first opening they had.

Q. And you had done it before that time?

A. Yes sir.

Further this witness saith not.

The next witness, MAJOR GENERAL PRINCE, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your name is Major General Prince?

A. Yes sir.

Q. How old are you?

A. Fifty-nine.

Q. Where do you live?

A. Chattanooga.

Q. How are you employed at the present time?

A. Combustion Engineering Company.

Q. What kind of work do you do for them?

A. Well, at the time I am office clerk.

Q. Did you have to cub for that job?

A. No, I didn't cub for it. They just gave it to me.

Q. Did you work for the NC&StL Railway?

A. Yes sir.

Q. And before you worked for the NC&StL Railway what kind of work did you do?

A. I worked at the Comoustion.

Q. Oh, you worked at the Combustion?

A. Yes sir.

Q. What kind of work were you doing there then?

A. You might call it boilermaker, is what we always called it. Rivet driver is what it was.

Q. And when was it you started with the NC&StL Railway?

A. The third week in March, I believe.

Q. What year?

A. 1944.

Q. Last year?

A. Yes.

Q. Did you have to spend sometime cubbing or posting?

A. Oh, I spent about five weeks down there and worked four days.

Q. Five weeks cubbing or posting?

A. Yes sir.

Q. How many hours a day?

A. Well, I would cub as high as twenty-four.

Q. Sir?

A. Three shifts.

Q. You mean you cubbed twenty-four hours in one day?

A. Maybe twice, I wouldn't say. I know we cubbed once twenty-four hours, first, second and third shifts.

Q. Well, generally how many hours a day?

A. I generally cubbed ten or twelve, something like that, just go home when I got ready.

Q. Every day?

A. Every day except Sunday. I didn't go on Sunday. I did go one or two Sundays too.

Q. Were you off, as far as you can remember, a single day?

A. I was off one day, just a day sick, because I didn't feel like working.

Q. But was it every day, except those Sundays you didn't work and the one day when you were sick, that you cubbed through the whole period at least ten or twelve hours a day?

A. Yes.

Q. Have you ever been paid for any of that?

A. If I have I don't know anything about it.

Q. You mean you have never been paid?

A. No sir.

Q. What job did you cub for?

A. Yard clerk.

Q. Any other job?

A. No sir.

Q. What do you have to do when you are a yard clerk?

A. Well, several different things, several things added on it. I couldn't hardly say, but checking or tagging cars, and taking seals off cars, the numbers of the seals, and putting them back on, especially where the car goes into town. That is mostly the job. That is what they have to do, the way I figure it.

Q. And did you do that while you were cubbing?

A. Yes sir.

Q. Was there another yard clerk with you all the time?

A. Just part of the time.

Q. Was that part of the time in the beginning of your cubbing or along toward the end of your cubbing? When was that?

A. He went with me maybe for an hour or two and I finished it up by myself.

Q. Every day?

A. Mighty near every day that way.

Q. And that happened day after day?

A. Yes sir.

Q. Did you ever talk to anybody about working regularly or getting a job where you would get some pay?

A. No, I never asked anything about it.

Q. Did you ever work during that time for pay?

A. No sir.

Q. You didn't?

A. No sir.

Q. Mr. Prince, to refresh your recollection, didn't you work on three different Tuesdays and get pay for it?

A. I don't remember two different weeks what I did—I worked in two different weeks—I have got a paper (looking for record).

Q. Have you got a record of it?

A. Yes sir, if I aint got away with it. Yes sir, here it is.

Q. What is this you have in your hand?

A. That is the dates I worked that I have marked on the calendar.

Q. These are sheets from a calendar?

A. Yes sir.

Q. Can you refresh your recollection by looking at that and tell us what days you may have worked and gotten paid for?

A. April 18th I worked and doubled over and made two days, then the 25th I made one day and then May 2nd I made another day.

By the Court:

Q. What year?

A. 1944.

By Mr. Jansen:

Q. And was that during the time that you were doing this cubbing?

A. Yes sir, I worked four days in that time.

Q. What did you do the days before you worked and got paid?

A. I didn't do nothing only just those four days I was paid—

Q. Did you do any different kind of work on the days you got paid for and those days you were cubbing?

A. No, I just worked on the yard clerk job.

Q. You mean to say it was the same kind of work?

A. The same work. I never did cub any other job but that one.

Q. So, if I understand you correctly, you would do cubbing for a few days and then one of these days would come along and you worked and got paid for it?

A. I cubbed about three weeks, I guess, something like that, that is, before I went on the payroll.

Q. How did you know you were going to get paid; how did that come about?

A. Mr. Boren put me on the payroll, made out a slip and put me on the payroll and the next day or two I went to work.

Q. Was some regular man absent or something like that?

A. I imagine so by that.

Q. Then after you worked for that one day, what did you do after that?

A. I cubbed the next day.

Q. And that happened on these different occasions as you were going along?

A. Yes sir.

Cross Examination,

By Mr. Whitwell:

Q. Major General Prince, were you working for the Combustion Engineering Company during any of the time when you were training down there for the position of yard clerk?

A. No sir, I didn't work anywhere.

Q. Can you tell us when it was that you went down there and applied for a position and asked them to cub?

A. In the third week of March. I don't know what date it was but in the third week in March I asked for a job.

Q. And when you made your application you were told, I believe, that you would have to post or train for a period before you could qualify for the job?

A. He said that I would have to work, it might be three or four weeks or it might be a month, he didn't know, but I would have to work several days before I would get to work any.

Q. He said you would have to cub a while, didn't he, or train awhile before there would be a job for you—that is what he said?

A. He said I would have to cub a while before I got to work any.

Q. And you understood that before you went down there, didn't you?

A. Oh, I imagined I would have to do that to get onto the work.

Q. And you understood before you went down there and before you started this cubbing, as you call it, that you were not to be paid during the time of your cubbing?

A. He didn't say anything about being paid.

Q. Now, you say on about one day there you cubbed or trained three different shifts?

A. Yes sir, I cubbed twenty four hours a time or two.

Q. Well, you did that to learn the job, didn't you, that you had applied for?

A. Well, he wanted me to stay there and do that, cub them shifts.

Q. Well, he didn't ask you to cub all three shifts the same day, did he?

A. Not exactly. He asked me to cub two of them a time or two and the third shift then began and I had no way getting home so I just stayed the third shift. In a way he wanted me to learn the third shift. He was expecting a job to be open on the third shift and he wanted me to learn that too.

Q. Isn't it a fact that when you cubbed the first shift, if it had suited you, you were at liberty to leave right then and cub another shift at another time?

A. Well, he never told me anything about that.

Q. You weren't required to cub three shifts one day, were you? Sir?

A. He never told me nothing about cubbing three shifts.

Q. And if you cubbed three shifts in one day you did it voluntarily, didn't you?

A. Well, he told me to cub them. He told me he wanted me to cub the second shift a time or two, that is all.

Q. He didn't tell you you had to cub two shifts or three shifts on the same day though, did he?

A. Well, he told me to cub a time or two on the same day, to double over.

Q. You don't happen to have anything against the Railroad, do you?

A. No sir, I ain't against the Railroad for I worked for them four years ago.

Q. Now, you referred to a calendar record, I assume you have a record from which you made the statement that you cubbed five weeks?

A. Well, I know I went to cubbing the third week in March. That is all I have got. I have just got here the days I worked.

Q. You made that statement from memory, didn't you?

A. Three weeks—I don't know what date it was, in the third week in March.

Q. What impressed it so much on your mind that it was the third week in March?

A. Well, that is where I got it in because I cubbed that many times, that many days of the week. I went down there the third week in March. I don't know what date it was.

Q. Well now, why is it that you make that statement that you started the third week in March cubbing?

A. Well, that is where I figured it. I said I went down there the third week in March.

Q. You just say that because you just figure that?

A. I went down there in the third week in March.

Q. Now, you say you worked there April 18th?

A. Yes sir.

Q. Now, from what source did you get that date?

A. Mr. Born told me the first shift and then when the shift come on, he asked me to work the second.

Q. I am asking you this: from what source did you get the date April 18th, 1944?

A. Well, I went home and got the date on my calendar so I would remember the days I worked.

Q. That day you worked, you put it on the calendar?

A. Yes sir.

Q. And the days you cubbed you put nothing on the calendar, is that right?

A. That is right; no sir, I didn't put anything.

Q. Did he tell you he would pay you the regular established rate for that day, April 18th?

A. He didn't tell me what he would pay me.

Q. Well, did you get paid for it?

A. Yes sir.

Q. Now, why were you so interested in putting that date on the calendar when you said you put nothing on the calendar and made no record of the dates when you were cubbing?

A. Well, that is a good way to keep a record of what you work for.

Q. Wouldn't it have been nicer to have kept record of the dates you cubbed and have put them on the calendar?

A. There wasn't any use of it; I wasn't getting paid for it.

Q. Therefore, you were paying no attention to that then?

A. I wasn't getting no pay for it and there wasn't any use.

Q. There was nothing to impress it on your mind, was there, the days you were cubbing?

A. No, just lots of work, that is all.

Q. When did it become impressed on your mind that you had cubbed or trained for five weeks?

A. It didn't bother me at all.

Q. When did you first begin to think about it?

A. I didn't think about it at all. When I worked I wanted pay for it, that is all.

Q. You are just guessing now about the period of your training, aren't you? Sir?

A. When I work I put it down where I won't forget it.

Q. I am talking about your cubbing now—you are just guessing about that?

A. No, I know I am coming closer than that.

Q. Now, at the time while you were cubbing, Mr. Prince, you were cubbing with a regular employee, weren't you?

A. Well, I imagine he was. I never asked him. I imagine he was regular.

Q. And it was a regular yard clerk who went around there with you and took time to show you some of the duties or the various things a yard clerk has to do upon becoming employed, didn't he?

A. He went around a time or two with me, yes sir.

Q. What did he do that time or two he went around?

A. He showed me the tracks, where the tracks laid and the numbers. I think that is about all.

Q. He didn't show you anything about how to make record of cars that were destined to certain points or shifted to certain tracks and things like that?

A. He did in the office. He showed me how to make out cards and tack on the cards.

Q. You learned that in the office?

A. Yes sir.

Q. And you learned on those one or two trips, as you have stated, all you know?

A. There wasn't no use to have to go every day with a man. If you do he never will learn it. If you are not going to learn it then you will never learn it.

Q. Well, after he went around and showed you—he first went around and showed you how to do things, the location of the tracks and things like that, didn't he?

A. He showed me the tracks the first day I went around with him.

Q. Then do you say he never went around with you any more after that?

A. No. He at first made one trip a day out there and showed me some different things. He would show me or something of that kind.

Q. And just turned you loose there after one or two trips?

A. Just a few trips.

Q. And then you cubbed five weeks and then you worked three or four days and quit?

A. Yes sir. I cubbed about a week after I worked the last day.

Q. Now, on this April 18th that you speak of that you worked, you say some man had to be off his job temporarily?

A. I imagine he was by me being on the job.

Q. And then you worked extra on or about the 25th, you say?

A. Yes sir.

Q. Then you worked again about May 2nd?

A. Yes sir, I believe it is.

Q. Were you paid the regular rate, the established wages for those jobs for that time?

A. I never asked what the pay was but I got paid for four days. I never asked them but I got the pay.

Q. And then was it along about that time that you quit and left the Company?

A. I quit about a week after I worked the last day, something like a week or ten days.

Q. Do you know that a voucher has recently been issued covering the period that you cubbed down there?

A. What was that?

Q. Do you know that a voucher has been recently issued for the period that you cubbed or trained for this position?

A. I don't know.

Q. If you get that voucher, if it is already issued and already gone, if you get that will it be satisfactory to you?

A. I don't know.

Q. Sir?

A. I couldn't say. I don't know about that.

Redirect Examination,

By Mr. Jansen:

Q. Just one or two questions, Mr. Prince. Is your present address the same address that you have been living at for sometime?

A. Yes sir.

Q. Does the Railroad have your address?

A. Yes sir.

Q. And they have had it ever since you cubbed down there?

A. Yes sir.

By the Court:

Q. Did the Railroad Company promise to pay you anything during your training period?

A. No sir.

Q. Did you understand that you were working without compensation during that period?

A. They never said anything to me about pay at all.

Q. Well, did you expect any compensation for that period?

A. No, I wouldn't expect it for I don't think they paid it.

Further this witness saith not.

Mr. Jansen: If it please the Court, at this time I would like to offer the deposition of Mr. Born, John Edwin Born, and with the Court's permission, I would like to ask Mr. Cadra, who is associated with me in this case, to read the deposition.

The Court: Who is Mr. Born? Why don't you bring him in? Is he available?

Mr. Jansen: Yes sir, he is here. We have taken his pre-trial deposition. We subpoenaed Mr. Born to bring certain records but as long as we took his pre-trial deposition we don't—

The Court: Well, if there is no objection, go ahead. How long is the deposition, very long?

Mr. Jansen: Oh, about twenty or thirty pages, direct, I think.

The Court: All right.

Mr. Whitwell: I might make this preliminary statement. Mr. Born is here and in all probability we will use him. I just make this statement for the benefit of counsel.

The Court: Is Mr. Born here in court now?

Mr. Jansen: Yes sir, he is.

The Court: I think you had better put him on the stand then, Counsel. I don't exactly understand using the deposition of a man that is right here in court.

Mr. Jansen: Therefore, if I might examine Mr. Born as an adverse witness. He is chief clerk of the Chattanooga Cravens Yards.

The Court: Do you want to point out any reason why you should be permitted to use his deposition when the witness himself is sitting right here?

Mr. Jansen: I say if I may be permitted to examine him as an adverse witness on the witness stand, I have no objection.

The Court: Is he an employee of the Railroad Company? This is the same man you have the deposition of?

Mr. Jansen: Yes sir.

The Court: Very well. Proceed to call him up here.

Testimony of J. E. Born

The next witness, J. E. BORN, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your name is John Edward Born?
A. Yes sir.
Q. You live in Chatanooga?
A. Yes sir.
Q. You are employed by The NC&StL Railway?
A. Yes sir.
Q. Chief clerk, are you?
A. Yes sir, Cravens Yard, at the yard office.
Q. You are the man who takes applications for employees at the Cravens Yard?
A. For certain employees.
Q. Which ones?
A. Callers, messengers, porters and clerks.

By the Court:

Q. Stenographers?
A. And stenographers.
Q. You don't take applications for trainmen?
A. No.

By Mr. Jansen:

Q. Except for the final approval, you have authority to hire and fire employees?
A. To a certain extent, yes sir.
Q. Now, Mr. Born, prior to a short time ago you had a practice at the Cravens Yard of posting or cubbing these office employees that you have just spoken about, did you not?
A. Posting, yes sir.
Q. And when you were posting one of these employees did you keep record of the hours worked?
A. I kept a separate memorandum in my desk drawer, just a pencil memorandum, in order to know just about how long a man was posting to determine about when he should be able to qualify.

Q. Well, you mean you took—you made a memorandum of the time he started?

A. Yes sir.

Q. And then whenever you thought you might want to think about him you would look and see how long he had been on and get that information from your pencil notation?

A. I watched that fellow to see about how many days he had been posting and then would question him and talk to him and determine just how much he had learned.

Q. Now, did you make record of the actual hours he worked?

A. I did on this memorandum.

Q. What did you do with that record?

A. Well, I kept them filed up there and they accumulated in my desk and I put them in the other office and some of them have been misplaced, some other were knocked off and destroyed, and some got wet due to the plumbing leaking.

Q. When Mr. Porter, Inspector of the Wage and Hour Division came down to see you did you check the records of hours worked by all these various employees?

A. As nearly and as correctly as I could from looking over the personnel itself and a knowledge of the conditions.

Q. The hours worked or the days worked, which?

A. The number of days. I didn't try to keep the hours.

Q. That is what I am getting at. I asked if you kept record of the hours. You didn't try to figure the hours?

A. No, I figured a day as eight hours.

Q. And that is the only record you kept, the actual days worked?

A. Well, in some cases I tried to keep a memorandum of the hours they worked on one shift and probably two or three hours on another shift.

Q. That might have occurred a number of times?

A. That occurred a few times.

Q. How about where they worked double time, worked two shifts in one day, did you keep a separate record of that?

A. They didn't work, now; they posted. And I kept a little memorandum of that for my own personal benefit.

Q. But not for the records of the Company?

A. No sir.

Q. That was a memorandum that you kept for your own personal benefit?

A. That is right.

Q. Now, Mr. Born, do you still post callers, messengers, porters, stenographers and yard clerks?

A. Yes sir.

Q. Do you pay them now?

A. Yes sir, we pay them.

Q. How much do you pay them?

A. I don't know the exact rate, but I think it is forty cents an hour while they are posting.

Q. Is that wages?

A. No sir, it is not wages.

Q. It is not wages—what is it?

A. It is just merely an incentive payment or inducement or gift to them to encourage them to stay there and learn something about the work so that they can qualify to take a job as soon as we can use them.

Q. So you don't admit that you are paying any wages to any of these types of employees?

A. Not to the trainees, no sir.

Q. These cubs?

A. While they are posting, no sir, that is not wages.

Q. And none of the money that you are paying now to a caller, messenger, stenographer, porter, yard clerk, record clerk, tonnage clerk or a clerk who is cubbing or posting is paid to him as wages, is that right?

A. No sir.

Q. That is right—it is not paid—

A. It is not paid them as wages.

Q. What kind of work does a porter do?

A. Well, he has got two offices to look after and there is quite a bit of routine in connection with his work, sweeping up two floors, keeping the dust off the records, washing out the lavatories, taking out cuspidors and running a few little errands for the operators.

Q. How long does it take a porter to get on to sweeping the floor?

A. Well, the young boys we have had down there on that particular work, young school boys, it takes those about normally two days to get onto the system and routine and to know just exactly how to take hold and carry it on without any possibility of delay or interference. I have got one boy now that has been there a week and he don't know how to use a broom.

Q. Is he still cubbing?

A. No, I have got him on. He is on duty.

Q. What do you do with a porter? Do you have to follow him around and watch him sweep? And clean out cuspidors?

A. Some of them take a day and some of them take two days to know the location of the various waste baskets and what to do with all the rubbish and where to get their supplies to replenish toilet supplies and what to do up at the general office and in the little offices. I don't have to personally go around and show these details to these boys but have a regular porter to follow him around and see what he does and tell him and explain about all these little things throughout the time of posting.

Q. Then after he gets through with this one day's posting you pay him real wages?

A. As a rule, I am ready to put him on by the third day as a regular, full, hired employee and pay him wages.

Q. But up until that time whatever you give him is a gift?

A. That is right.

Q. How about stenographers, are they posted, too?

A. Yes sir, we do. We find it necessary to have them post to learn the filing system and learn about the various and numerous reports that we require them to get up from different records that we have there in the office.

Q. You don't operate a business college at the railroad?

A. Oh, no.

Q. You accept anybody applying for a job as stenographer who is a graduate of a business college, don't you?

A. Well, ordinarily, yes sir.

Q. And who have some training, as a matter of fact?

A. Yes sir.

Q. And you have required stenographers and even do now to post even though they may have had ten or twelve years' experience in taking shorthand and writing letters on the typewriter?

A. We don't require them to post to determine their fitness for taking dictation and transcribing their notes right on the typewriter.

Q. Oh, you don't?

A. But we require them to post to learn the routine duties in connection with that kind of work that we have, various reports they have to get out, and the filing system there. They would be at a loss if we didn't require them to do that.

Q. So the posting you require stenographers to do is to learn the special system that the NC&StL Railway has with reference to files, records and the like?

A. That is right.

Q. And until they have had sufficient experience with this system that railroads keep you keep them posting, is that right?

A. Yes, sir, I let them post until I think they understand the routine and what there is to do in connection with the duties of the job so that they can handle it by themselves.

Q. What is the average time that a stenographer spends posting?

A. Well, that would depend on the ability of the applicant.

Q. Well, what is your experience?

A. Well, we haven't had so very many stenographers down there, two of them about two days each.

Q. You think that would be about the average?

A. About five or six days would be the average time that they would consume in learning the routine.

Q. One of them did it in two days?

A. That is true. Mrs. Born did that.

Q. That was your wife?

A. That is my wife and she didn't complete the cubbing but I was forced to use her because I was in trouble and

had to have help, and I had to do the biggest part of the work.

Q. Is she the only one that you know of, that is, a stenographer cub, that was able to complete their posting in two days?

A. She didn't fully complete her posting in two days but I had to have someone there that could take dictation and I had to teach her the rest of the job after I put her on the job.

Q. That was one case where the shoe was on the other foot, she was taking dictation from you?

A. Yes sir.

Q. But otherwise, generally the average is about six days?

A. Yes sir. It would have taken her that long, you understand, but we were so far behind I had to have somebody there and I couldn't get any other stenographer anywhere and I had to put her on the payroll and get her to take some of these letters and correspondence and get it out of the way, we were so far behind.

Q. Now, do you require callers to post?

A. Yes sir.

Q. What does a caller do?

A. A caller calls train crews. Train crew callers call train crew members and engine crew callers call the engine crew members, and the train crew callers in my office are in our yard department and they call the train crew members when the train is ordered, at their cabooses and at their boarding places, and they keep a roster of those crews and when their rest period is up and when they are ordered and see that they are notified and called within their legal time before departure so that they can get ready for their runs. And they have to have a permanent record, make up call cards and see that they are filled out and keep up with all these men.

Q. How long ordinarily do you require a caller to post for this job?

A. That depends on the ability of the boy, the applicant, and they learn that work there sometimes one day and sometimes maybe it is three days before they can get on to the routine and understand enough about it, and

this register where these train crews register, it is not simply—it is simple as far as reading and writing is concerned but to understand the different classes of crews that we have on there, these boys have to compile their lists so they will know which crew goes on which run and a new boy, he can't understand that.

Q. So do you send around with him another caller?

A. We send around with him another caller to learn him the various cab tracks and how to find the various places in the yard that the cabooses might be located on, where their boarding places are, their telephone numbers, how to read those registers, how to keep the train numbers marked up with the crews in their proper order.

Q. Now, when you have a caller or a porter or a stenographer you usually tell them when to report, do you not?

A. Yes sir, I tell them, now, you can come out in the morning. I generally try to break in a new person or applicant on a day job so he can get used to the yard, so he can see where he is at, get him located, because it would be too dangerous to put him on that job at night. There is too much hazard there. He would probably get run over and wouldn't know how to take care of himself, and I start him out in the daytime for that reason and generally tell him to come out on the shift that goes to work at 6:30, to report to this other caller there and he will show you the duties of that job.

Q. These messengers, what do they do? Do you cub them?

A. I have to post messengers to learn the various offices throughout the town. They have got a route to go over to distribute mail without getting it mixed up or misplaced and what to do with certain classes of mail.

Q. Do they travel around by bicycle?

A. As a rule they do. Sometimes they ride the busses and sometimes they walk.

Q. How does a cub travel when he is cubbing a cub?

A. He generally goes along with him. Sometimes they have to double up, two on one bicycle, one on the handlebars and one on the seat.

Q. How long ordinarily does a messenger cub or post, on an average?

A. About three days.

Q. Now, you have heard the testimony of Mr. Rosenhiem and Mr. Prince, have you?

A. Yes sir.

Q. They cubbed for a clerk's job?

A. They posted for a clerk's job.

Q. And those are the jobs, remaining jobs that you haven't yet testified about, the various clerks' jobs?

A. I haven't talked about them yet.

Q. In the way of clerks' jobs you have a weigh clerk, train clerk, yard clerk and record clerk, is that right?

A. No, we don't have a weigh clerk.

Q. Waybill clerk?

A. No.

Q. What are the classifications?

A. We have yard clerks, train clerks, tonnage clerks, interchange clerks, record clerks, utility clerks, stenographer-clerks and chief clerks.

Q. About eight different classifications?

A. Yes sir.

Q. Do you require a man applying for the position of any of these outside of chief clerk to cub for it?

A. To post?

Q. Or post?

A. Yes sir.

Q. What is the average time that a man is required to post for the job of yard clerk, for example?

A. Well, the average time for an alert and energetic and apt applicant is about a week to get just enough of the fundamentals of the job where we can risk him on it with the help of the other clerks. That is the average time for that type. For those that appear to be slower and not quite so quick to learn, the average time is around twelve days.

Q. That is a yard clerk, a fellow that goes out in the yard and gets the numbers off the cars and marks the cars and whatever the duties might require, that part of the job?

A. Yes.

Q. Now, does that average time apply to record clerk or does it?

A. The same thing will apply to that type of applicant for the record clerk.

Q. How about the train clerk?

A. About the same.

Q. In fact, for any one of the clerks' jobs you think that is a fair statement that it would require, the average time it would require a man to cub or post before you could put him on regular?

A. Well, we have been forced to cut that posting time down due to labor conditions and on account of the war to about that average but they are far from being—

Q. When did you start cutting the posting time on account of the war?

A. Due to the need for help—

Q. Tell me, now, Mr. Born, how do you account for the fact that Mr. Rosenhiem cubbed for five or six weeks?

A. Mr. Rosenhiem was very, very slow to learn and I sent him out on the yard on one trip with one of the outside yard clerks and he told me he was scared of that kind of work and didn't want to train for it and I showed him the train clerk work and he said he would like that but after I explained to him he thought it was a little too detailed for him to remember and catch on to and he asked me about record clerk and I said, "Well, you can probably do that record clerk work and relief work." I said: "You learn that." I said: "I will let you work some on that." I said: "That is about all you can do" and I put him over there to learn the record clerk, and he was so very slow in learning, in fact, he never did learn it to the extent where we didn't have to check it a lot, that is, follow it up, the regular clerk did.

Q. When a man is learning the job as record clerk like Mr. Rosenhiem was, does he actually make entries in the books?

A. He made quite a few of them and did quite a little bit of that in order to show him how to get the records down and how to find the different pages in the records and so on.

Q. What do you do, keep a man there cubbing or posting until you find him a job or until he becomes discouraged and quits or what?

A. No, we let a man post on long enough to qualify himself, that is, to understand enough about the work that we can risk him on that job, and then with the cooperation and help of the regular clerks all along, why, that man, in time, gets time to take care of some of the work.

Q. Don't you think you have the responsibility to tell those men they can't qualify for the job and they ought to go and look for a job some place else after they have done two or three weeks of this cubbing?

A. Generally I do. Now, in Mr. Rosenhiem's case, as I said, he was very slow and I felt sorry for him and wanted to help the man. He told me he needed work and was anxious to get work, would like to work, and I took a little more pains with him than I would have with anybody else.

Q. How do you account for the fact that you let him work for nine days and then wanted him to go back to cubbing again?

A. Because he trained and only learned one job, record clerk's job.

Q. Go on. I still don't understand.

A. Well, he was trained and learned the record clerk work only.

Q. Yes sir.

A. He tried the yard clerk about half a day and gave it up; he couldn't make it. He tried train clerk probably a day and a half and then during idle moments while posting on the record clerk he would go over and sit down beside the train clerk and watch that class of work. He readily saw that he wouldn't be competent to do that and then he asked me to let him continue to learn thoroughly the record clerk's work. So I told him to stay over there until he learned it. Well, he was very slow and I let him stay there longer than I would anybody else because the boy had already been promised off on his vacation and I didn't have anyone else that I could turn loose on the record clerk, so I thought probably I could fall back on Mr. Rosenhiem if he stayed over there and learned enough.

Q. You turned him loose for nine days then?

A. Yes sir, I let him work the job for nine days as an employee.

Q. Then explain why you wanted him to go back to cubbing again.

A. He wanted more work. He was only qualified for this one class of work. He knew nothing about train clerk and yard clerk and I told him: "You could do that work if you knew it but you don't know it. You will have to post a little bit on this to know the routine" and he gave up.

Q. You did ask him to go back to cubbing again?

A. I didn't ask him to cub. I told him if he wanted to get some more extra work it would be necessary for him to post. I didn't tell him to cub.

Q. You said in order to get extra work, that is, get on the extra board and be qualified to take this record clerk job it would be necessary for him to post, is that right?

A. He posted on the record clerk's work and learned that clerk's work only and he was on the extra board after I put him on the payroll and he filled the job of record clerk and got the full rate of the job. He was on the payroll in the capacity of an extra employee but he wasn't capable of doing these other types of work and I couldn't give him enough work. There are only three record jobs and those boys wouldn't lay off enough to keep him up; he would starve to death and they had to live too and that was the only type of job that he knew, the only type of work. Then he wanted to do some of this other and I said: "You don't know that. It will be necessary for you to post a little bit on that and learn something about it." He didn't care for the outside work and gave it up.

Q. A few minutes ago you said while he was doing this record clerk's job if he had a few idle moments he would go over and look at the train clerk's job.

A. He did have a few idle moments. He had plenty of idle moments. The regular record clerk did the bulk of the work and he sat on a stool over there and grinned and looked out the window and once in a while he would get up and come over, saunter over to the other part of the office to the train clerk and sit down and talk to him and watch him a little while and then directly he would come back and we were so rushed and so behind in the work that the regular record clerk couldn't turn loose

altogether for any length of time. He was too slow but we did let him post some records. We had two books and we let him post—they are both the same size, great big books and there is a hundred sheets in there and we work the record on both sides and you have to find a certain page, and he has got to know where to reach for it without tearing a page out of the book and the man that has got the knack of it can do it, can put down the record, the complete record of a train there in just a minute where a new man that is slow would take fifteen or twenty minutes.

Q. Tell me, Mr. Born, how do you account for the fact that Mr. Prince cubbed and then on different days in different weeks he worked and got wages and then went back to cubbing again?

A. Well, to my recollection, Mr. Prince didn't cub quite as long as he said awhile ago. Mr. Prince was a sincere fellow and I had patience with him. He was very slow and I thought I could get him to learn this simple job of yard clerk and that was the only one he trained on. I knew he wasn't capable of doing the tonnage clerk's job or more responsible jobs and I let him cub several days, I forget the exact days, approximately ten or twelve days on the yard clerk job. Then a vacancy showed up. One of the regular men was off. Then I put Mr. Prince on the payroll at the full rate of that job. He became an employee at that time and then he worked different vacancies of the yard clerk class only. He didn't work as train clerk or tonnage clerk or record clerk. He knew nothing about those and after working this yard clerk vacancy, you see, we have three shifts, twenty-four hours. A job would be open, the first shift, and I let him work that a day or so, and on the second, double through. That is another job. While he wasn't working on that job he came over and hung around and sat around and posted, so to speak, trying to learn something of the other work.

Q. So he would work one day, you say, paid to work as an employee?

A. Yes sir.

Q. And then he would skip the next day and post and then he was not an employee?

A. No, he didn't cub all the time with my consent as a trainee. He came down there several times and I asked him "What are you doing?" And he would say: "Nothing. I thought I would some down here and see what I could pick up." I didn't have any objection. He was already employed then but he was an extra man and had no work assigned, no job to go to.

Q. Now, if I understand it correctly, Mr. Born, you didn't know there were instructions from the Railroad to pay at least forty cents an hour to these cubs or people that were doing posting for these various jobs until just very recently, is that right?

A. That is when I knew of it right here, I believe it has been since the first of the year or maybe prior to the first of this year, that I was instructed or understood that they had to be paid forty cents an hour when posting.

Q. That is not wages though?

A. No, that is not wages. If they got wages they would get the full clerks' rate or the jobs' rate.

Q. Now, have you paid off all of these cubs or posters that posted before that time?

A. Oh no, they haven't been. Vouchers have been made for all of them, everyone of these trainees. What you speak of as cubs, I speak of as trainees, that posted. Vouchers have been made out for approximately the amount of time that they spent, consumed in posting.

Q. How did you figure out their time?

A. From personal memory, their being right there under my supervision and knowing just about what each man did, how slow and how proficient he was.

Q. Well, you, as a matter of fact—

A. I approximated the time as nearly correct as I possibly could get it.

Q. Do you have those vouchers with you?

A. No, but I have a record of them. I have record of everyone that has been issued.

Q. Have you delivered them in person or mailed them?

A. We cannot mail a man's voucher to the man's home or address unless he requests us to do that.

Q. You had Mr. Rosenhiem, did he request you to do that?

A. He did not request us to do that.

Q. Have you got a voucher made out for him?

A. There has a voucher been made out for Mr. Rosenhiem.

Q. For how many hours?

A. I don't know without referring to the record but that voucher is made out and in the Chattanooga office right now.

Q. As a matter of fact, it is a matter of your own personal guess as to what hours these cubs worked?

A. Not a matter of my own personal guess because I did have a lot of records.

Q. Well, about the only ones that were lost were these pencil memoranda that you kept?

A. I knew pretty well myself from close supervision of the cubs about how long these men, different men posted, approximately and if I was in doubt I conferred with the other clerks that they had posted with and talked with them and said: "How long—I have lost my memorandum—did so-and-so post with you, for a week?" and they would scratch their heads and say: "This cub posted with me three days and with so-and-so three days" and I would make a note, and in that way I would make a pretty accurate figure of the time they had put in.

Q. Have you got a record of the hours now?

A. Yes sir.

Q. But up until that time you didn't keep a record?

A. We did keep records but I didn't put them down right there where I could have handy reference to them.

Q. Did Rosenhiem ask you for his check?

A. He didn't ask me.

Q. Are those checks in your office or in the paymaster's office?

A. I didn't have anything to do with delivering the checks. We have one man in Chattanooga here, you might say, like a paymaster's office that pays the employees and these checks come to him under seal and they break the seal and take the checks and then they deliver them out to the different offices during certain hours and after those certain hours the men know where to go to get these checks.

Q. You don't know there is a check for Rosenhiem, you have never seen it?

A. I have got a list where it has been made out.

Q. Do you know for how many hours?

A. I can refer to that and tell you.

Q. Let's see it.

(Witness looks for the record).

A. 120 hours, $48.00 is what voucher has been made out to Mr. Rosenhiem for.

Q. 120 hours, that would be three weeks at 40 hours a week?

A. At forty cents an hour.

Q. How many days a week did Rosenhiem work?

A. Well, Mr. Rosenhiem worked about two weeks nearly every day.

Q. How many hours a day?

A. Eight hours. He would average eight hours. Sometimes he would leave before the job was through and go off duty. Sometimes he would come down late, and then during the cubbing or posting period on two different occasions to my knowledge—he said one but I know of two—one he was gone three days and the other one he was gone two days.

Q. So all you have got is practically three weeks or fifteen days of posting?

A. Yes sir.

Q. Of eight hours a day—that is what you have got for Rosenhiem, is that right?

A. Yes sir.

Q. And that is all you intend to pay him?

A. Well, if he can show me where he posted more than that I would recommend more for him but he didn't post more than that.

Q. How much have you got down for Prince?

A. Mr. Prince, there has been a voucher made out for Mr. Prince—let's see, it is right here—I have a paper, fifty six hours, that is seven days.

Q. Seven days at eight hours a day for Prince?

A. Mr. Prince didn't post the full time that he said he did.

Q. According to your record?

A. According to my record.

Q. Now, can you tell me from what records you got the information with regard to Mr. Rosenhiem and Mr. Prince by which you arrived at those figures?

A. Yes sir, from talking with the other clerks in my office that they were associated with and with whom they posted.

Q. How many clerks did you talk to with regard to Rosenhiem?

A. Three.

Q. Why was that?

A. Because they observed him there in the daytime and on the second shift, on the two shifts, with other clerks he posted with, at the time he posted.

Q. How many have you talked to with regard to Prince?

A. Two.

Q. And you took their word for it?

A. With my own knowledge of about how much time he spent to help me along. I talked to them about it.

Q. Now, Mr. Born, am I correct if I understand that you tried to get those clerks to post on all of the different three shifts during the day or some time or another?

A. Yes, sir, I required that because after dark falls the picture in the yard changes. It is more hazardous in a railroad yard at night than it is in the daytime and they can't identify the tracks in the night like they can in the daytime. They don't have illuminated signs to tell where each track is.

Q. You require them because of that that they post at least the different shifts sometime or another?

A. Now, they have to familiarize themselves with the lights, engine movements and the routine of night work.

Q. Have you got a record there with reference to this man Curtis Bomar?

A. He is at Fayetteville and Murfreesboro and that is entirely out of my district. I have nothing to do with that whatsoever.

Q. Fayetteville and Murfreesboro have nothing to do with Cravens Yards?

A. I am a personal man right there in Cravens Yards, right there in Chattanooga.

Q. In order for a man to really get some benefit out of his posting he has to post not only for one job, one type of clerk's job, but for all types of clerks' jobs, does he not, yard clerk, train clerk, record clerk and so on?

A. Well, to get the full benefit of extra work he would have to know the different types of jobs.

Q. So that he could get called from the extra board for any one of the various types of jobs, is that right?

A. That is right.

Q. And you tell them that too, don't you?

A. I tell them that but I always start them on the simplest job, that is, the simplest duties.

Q. Does it take a week or twelve days posting for yard clerk, record clerk, train clerk and the others that you mentioned, and a week to twelve days for each one, for a man to become familiar with four or five jobs?

A. No, no.

Q. How long would it take?

A. I start an applicant out on the simplest job, yard clerk, and it would take five or six or seven days to get on to it and know every track in the yard and the many hundreds of locations, different industries around Chattanooga and the routine things like tagging and marking cars to their proper destinations, and then while he is training on that job there will be times that he can go over and sit down with the train clerk and watch him operate the typewriter and let him show him how to read a waybill. There are several different types of waybills and some of them are very difficult to read and transcribe and learn all the names, and then small duties, to go out on the yard with this yard clerk, or there is some small function the yard clerk has to perform and he will come on and say: "Buddy, we have got to go out here and tag up a cut of cars," and he goes with him and he shows him how it is done, and probably let him do a little bit of it, but the regular man is right there with him all the time.

Q. He wouldn't be doing, as Mr. Rosenhiem suggested, writing on this record that he kept as record clerk for eight hours a day?

A. No sir. Mr. Rosenhiem has never worked himself eight hours pushing a pencil.

Q. He has not?

A. No. He is not physically able to do it.

Q. Now, as a matter of fact, Mr. Born, your usual practice is to cub a man until you have got a job available, isn't it?

A. Well, 99% of the time when I let an applicant post I have got an extra board job in view for him and I tell him—I tell them all—I never fail to tell them because they have got to hit the extra board first. There have been very few occasions when I accept a messenger, a porter or a caller that I could promise them definitely that they would be assigned to a regular job, permanent job. On clerk jobs, they would have to go on the extra board after they finished their training period and qualified to the extent where we feel like we are safe in risking them to do this simple yard clerk job. After they finish their training period and a vacancy comes up, probably on a job we think they cannot hold, for instance, the important tonnage clerk's job, and he is an extra man but he is not qualified, and I put him on the yard clerk's job and the older experienced yard clerk, let the old, experienced yard clerk step up on this more responsible job because he is more familiar with it and can probably do it, and then in the course of his work, this new employee and he becomes an employee when I put him on and he is paid the full contractual rate. Then while he is working the yard clerk job he learns to take hold and picks up a lot of the duties of these other jobs. And he cometimes has a spare moment, spare minutes there when he goes over—he is on full pay at the rated job, he goes over and just watches and catches on and probably assists a little bit and learns, and in that way qualifies himself while he is being paid the full rate on the job to do a higher and more responsible class of work.

Q. That is when he is lucky enough to get on the extra board and get a job?

A. Yes, gets on the extra board.

Q. I mean when he eventually does.

A. They understand—I tell them they have got to hit the extra board until a regular job comes open that they can take and work. They are all told that.

Q. And the general practice is for them to stay cubbing until there is some opening?

A. No sir.

Q. It is not?

A. Wait a minute. I believe I interrupted you before you finished there. I anticipated your question there. They post and cub or post and train for a certain length of time, as stated before, until I feel that they are qualified. There is plenty of boys wanting off and I am in a hurry for these boys to hurry up and learn the duties of these jobs to let these boys off. We work three hundred and sixty-five days a year, three shifts, and it keeps the management working every day in the year, and they want to get off. I try to hurry these trainees up and tell them to "bear down and try to learn everything you can because there is a fellow wants off and another wants off and there will be a lot of them wanting off if you will learn this work but if you can't do it I am certainly not going to let them off and let you on there."

Q. Do you have more than one yard clerk working in the office at the same time, regularly employed or employees that are on the extra board? Do you have more than one working in the office at the same time?

A. Not that particular, what we speak of as the yard clerk job. Every clerk we have got he is, in a general sense, a yard clerk. Every clerk we have got working in the office pretty well knows the job of record clerk and yard clerk—

Q. What were you trying to say?

A. The general term for all the clerks that work in a railroad yard is yard clerk but among those numerous jobs known as yard clerks there is different duties. Like one yard clerk would do tonnage clerk work and one yard clerk would do train clerk work and one yard clerk would do record clerk work.

Q. O. k. Are there record clerks, tonnage clerks and others working in the yard at the same time?

A. Yard and offices, yes sir.

Q. And the same way in the office, there is probably more than one regular record clerk working?

A. Only one record clerk on duty in one eight-hour shift.

Q. Is there any other that knows the job?

A. Some of the older employees.

Q. So that if you put a man on there that was absolutely green there would be someone there to show him the job?

A. There would be the regular record clerk to show him the duties of the particular job.

Q. And if the regularly assigned record clerk wasn't there, there would be somebody else?

A. He would have an older employee that knew the job that could show him as good probably as the regular man.

Q. And that is true in the case of all the office trainees, there is somebody there that could show them the job if they were absolutely green?

A. A more experienced, older employee that knew the job right there to help.

Q. Two or three or four of them perhaps that knew the job who could help him?

A. Yes sir, that knows the different jobs; that is true. My train clerks and tonnage record clerks, they know all the jobs. So we have got my train clerk, yard clerk and record clerk and while they are working the tonnage clerk, if he gets in a spot, they can help him.

The Court: That is right. They are there in that work too?

A. Yes sir.

(Recess.)

By Mr. Jansen:

Q. Just one more, Mr. Born. How long have those vouchers been made out?

A. Well, the first list has been made out over two months and the last list has been made out, I believe, within the past month.

Q. For a month?

A. Within the past month.

Q. Well, about how long?

A. Well, I don't know. I haven't seen any of them.

Q. Oh, you haven't seen them?

A. No. I have the record. That is just the record of them.

Q. Well, when was it you got the record?

A. Two or three days ago.

Q. Was Mr. Rosenhiem's voucher made out when he was down there a week ago?

A. Well, I don't know. It might have been made out but hadn't been mailed to the office down there with the other checks.

Cross-Examination,

By Mr. Whitwell:

Q. Mr. Born, some mention was made of Mr. Rosenhiem having cubbed a while for the position of record clerk and then did some work, I believe, it was extra work. Wasn't it at that time somebody who had a regular job and who temporarily was off the job and Mr. Rosenhiem worked extra?

A. Yes sir.

Q. That man returned to the job and if I understand it, when he returned, of course, he picked up that job and that left no immediate job as record clerk for Mr. Rosenhiem?

A. That is right.

Q. And then you suggested, as I understood it, to Mr. Rosenhiem that he, there not being a job for him at the time as record clerk, that he post or train for job of some other clerk like the position of yard clerk so that he could qualify for that and pick up some extra work there after he had qualified. Is that what you said?

A. I believe I said I told him that he would have to learn the duties, post and learn the duties of these other jobs if he expected extra work on the clerks' jobs, to get more work.

Q. Is that what you meant when you suggested to him when he had nothing but a part-time job as record clerk that he post for some other type of clerk's job so that if there was a vacancy that he would be qualified to step in

and get work on that kind of clerk's job? Is that what you meant?

A. That is what I mean, yes sir.

Q. Now, Mr. Born, is it a fact that back sometime ago, back in the early 40's that you got some instructions from the Superintendent of the Chattanooga Division that persons who applied for positions as porters, callers, messengers or stenographers or clerks that they be paid and that you overlooked or didn't understand those instructions, is that true?

A. Yes sir, I believe we did get some instructions but just during the rush of business I overlooked them and didn't comply fully with them.

Q. Now, after this lawsuit was filed it was called to the attention of the superintendent that you had permitted persons to post for these various clerical positions without paying them the minimum of forty cents an hour, or whatever the minimum was, and that he reprimanded you for permitting those persons to post without compensation?

A. Yes sir, he did.

Q. Now, did he, after the Wage and Hour people brought up this question after their investigation and discovery that at Chattanooga a number had been permitted to post for these jobs, without pay, did the superintendent, Mr. Tucker, request your office to get up a list of those who had posted in the past and the time, as best you could, that they spent in posting and turn it in so that the Railway could go back and pay people for this posting, which Mr. Tucker evidently thought had been already paid?

A. Yes sir, he did.

Q. Did you get that list up?

A. I got the list up; got up two or three lists.

Q. And I believe you said, in getting up that list, you had some records there from which you could definitely tell the number of days that a number of these persons had posted and in reference to some of the rest of them, why, you had to depend on your memory and you discussed with some of the other clerks in the office the posting time that was spent by some of these people and that

you arrived at the time that they posted to the best of your ability?

A. Yes sir, I did.

Q. You say that there might be some inaccuracies in the report but you did get up a report of all of them to the best of your ability, the time that they spent in posting, and turned it in for the purpose of payment?

A. Yes sir. It is as nearly correct as I could get it.

Q. And I believe you stated that one list was turned early this year, about February or January, sometime earlier in the year, and then a more recent supplemental list was turned in, showing the names of people who posted?

A. Yes sir.

Q. And you do know that a large number of people turned in on the first list have already received their pay?

A. Yes sir.

Q. And that, pursuant to the second list, which was turned in more recently, that vouchers have been issued covering the names of all those people?

A. Yes sir.

Q. That were turned in?

A. Yes sir.

Q. And did you turn in everybody that your records showed had given work or had posted there?

A. Yes sir, a complete list has been sent in.

Q. You said something about making some kind of check in the last two or three days. Did you make that over here in the accounting department of the head office at Nashville?

A. Yes sir, I had to get that.

Q. Is that where you found out that Mr. Rosenhiem's check had already been issued?

A. Yes sir.

Q. And Mr. Prince's check had been issued?

A. That is information coming from the general offices here.

Q. Did you find out from your investigation that those checks have gone out, have been issued?

A. Yes sir.

Q. Now, whether or not they have been delivered, all of them, you don't know?

A. No sir, I don't know.

Q. Now, when this was called to Mr. Tucker's attention that those people who posted back before this suit was filed had not been paid and no fixed record back there or detailed record of the time of posting had been kept except on loose sheets, some of them being lost, did you have instructions to, and have you since that time, and are you at the present time keeping accurate records or the Company keeping accurate records of the names of persons posting, the days and the hours of posting, and also keeping record of them for the purpose of making payment equivalent to the minimum provided by the Wage and Hour Law?

A. Yes sir, that is being done.

Q. Now, whether those payments that have been made, those back payments that have been made, were made as wages or made as a gift or made as compensation, that list has been furnished and the Railroad has gone back and issued vouchers for everyone of them, so far as you know?

A. Yes sir.

Q. Isn't that the truth?

A. That is the truth.

Q. And you are keeping those records now of every hour every day that a person posts and they are being currently paid for their time while posting?

A. Yes sir, I don't keep all the records.

Q. Well, those records come in and come to the accounting department, don't they?

A. Yes sir, they do.

Q. And those checks come from the accounting department based upon the days and the hours of each day that a person posts?

A. Yes sir.

Q. That is the truth, isn't it?

A. Yes sir.

Q. And so far as you know, is it not a fact that it is the intention of the Railroad Company, in good faith, in

the future to keep these records and make payments in compliance with the Wage and Hour Law?

A. Yes sir, that is my understanding that it is.

Q. These persons, while posting, Mr. Born—say the position of yard clerk—is it not true that they get their training under the instructions and observation of a regular yard employee who tells them and shows them and also lets them do part of this work from time to time and then checks their work to see if they have done it right?

A. Yes sir.

Q. So far as you know, does any person, while posting for any of these clerical jobs, do anything in any way that there is not a regular man there to do and paid to do?

A. No, there is not. There is a regular man right there and it is my instructions to this regular man to always go with this trainee or this applicant and if they go outside of my sight and permit him to perform some little duty in connection with the job, why, it is without my consent.

Q. Now, if Mr. Prince, when he started training for this yard position as yard clerk, if he trained two days with a man and then took over and ran the railroad for more than five weeks you don't know anything about that, do you?

A. No. Mr. Prince couldn't memorize the tracks in two days.

By Mr. Jansen:

Q. Mr. Born, one of the questions that Mr. Whitwell asked you was whether or not it was the intention of the Railroad to comply with the Wage and Hour Act in the future. Did you say it was?

A. I said that it was my knowledge that it was.

Q. Is it your understanding that the Railroad admits that these posting and cubbing porters and the rest are employees?

Mr. Whitwell: We will take care of that. That is a legal question. Our answer states our position.

The Court: Yes sir. I think you are asking for a conclusion now.

By Mr. Jansen:

Q. Have you got a man by the name of Webb on your list?

A. No sir, not now—oh yes—

Q. How much are you paying him?

A. I believe three days posting.

Mr. Jansen: Counsel, am I to understand that these people working in the office, that you admit that these people working in the office are employees of the Railroad when they are cubbing or training or posting?

Mr. Hunt: I think our answer states that the management determined and elected to treat these posters as employees and gave instructions that they be compensated and treated as employees. Now, that was past and present instructions but on that phase of the case, if we are correct, it requires no determination that they are not employees. The situation has developed here, whether we elected to treat them as employees or not, if the Court thinks that we were not making payment it, of course, would have to make the determination they are employees and were not compensated. But it has been the position of the Railroad that those posters might—it always recognized the possibility that posters might perform some beneficial service and it elected to treat them as employees. Its management gave the superintendents instructions to that effect and they gave them to various other supervisory officials but at Chattanooga that was not done, that is to say, they were not treated as employees and record kept and the moment that came to the attention of the management that situation was corrected at Chattanooga. Does that answer it?

Mr. Jansen: No, it does not. I asked you if you admit that these people who were cubbing in the office were employees of the Railroad.

Mr. Hunt: And we stated that the management elected to treat them as employees and subject to the Act and comply with the Act for this purpose.

Mr. Jansen: Then you don't admit, without qualification, that they are employees?

Mr. Hunt: We don't admit that they are employees.

Mr. Jansen: You don't admit that they are employees, under the Act?

Mr. Hunt: No.

Mr. Jansen: That is all I wanted to know.

The Court: Of course, if they are complying with the Act it doesn't make any difference whether they admit that or not because, even assuming that they are employees, if they comply with the Act, that is the end of the story.

Mr. Jansen: I feel that we can be prepared to argue that point when it comes time to, if the Court please.

The Court: Have counsel both finished with this witness?

Mr. Jansen: Yes sir.

By the Court:

Q. Now, that I may be sure to assess your testimony correctly, as to these non-operational employees—clerks, stenographers, messengers—posters, you call them, does the defendant Railway Company pay all of these people during their training period 40 cents an hour now?

A. Yes sir.

Q. How long has that been in effect?

A. Well, I can't say exactly but some time this year.

Q. Except as to the Chattanooga situation, now, how long has it been in effect?

A. Well, I don't know what the conditions are at all the other parts of the system, in other terminals, but I do know we are paying it there in our Chattanooga terminals now.

Q. How long has it been in effect in Chattanooga?

A. Well, for several months; sometime since, I believe, the first of the year.

Q. Even though you don't concede that they are em-

ployees, you are paying all these persons not less than 40 cents an hour during that training period?

A. That is right.

Q. Is that also true on the remainder of the system, on the rest of the system?

A. I wouldn't have the remainder of the system. I don't know what the uniform practice is.

Q. But you do know it is true and has been for several months at Chattanooga?

A. Yes sir.

Q. As to these trainmen employees, switchmen, brakemen and firemen, do you pay them $5.00 a day during their training period, provided they don't quit of their own accord?

A. That is my understanding.

Q. You say that is your understanding. Is that because you—is that true?

A. I don't have any jurisdiction of it.

Q. Oh, that is out of your department. You only have posters?

A. Only the yard office clerks, porters, messengers and callers.

Further this witness saith not.

The next witness, W. E. REDMOND, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your full name is what?

A. William Earl Redmond.

Q. How old are you?

A. Thirty two.

Q. Where do you live?

A. Chattanooga, Tennessee.

Q. How are you employed at the present time?

A. In the retail grocery business.

Q. Have you ever been employed with the NC&StL Railway?

A. I have.

Q. And when was that?

A. Approximately from the first week in January, 1943 until about the middle of July, 1944.

Q. During that time that you were employed or that you were at the NC&StL Railway were you required to do any free cubbing without compensation?

A. Yes sir, I was.

Q. How many days did you cub without compensation?

A. Five days.

Q. What kind of job did you work on with the NC&StL Railway?

A. Yard fireman.

Q. And you were required to cub, you say, five days without compensation for the job of fireman?

A. Yes sir, I was.

Q. And then after you cubbed you went on the extra board, did you?

A. Yes sir.

Q. And worked along as extra man until July?

A. Well, no, later on I got a job as seniority permitted.

Q. And you worked along down until July?

A. Yes sir.

Q. Now, can you describe a little bit in detail just what you did when you were cubbing as a fireman?

A. Well, I went to work with the regular fireman and he showed me and instructed me in the duties of a regular fireman. And then he permitted me to take the job over myself and try it and he would show me my faults, show me how to do it and then let him take over again.

Q. What time of the day did you start your cubbing?

A. My first shift started, the first day I cubbed was approximately 3:30 in the afternoon, or maybe 4:00, one or the other.

Q. How long did you cub?

A. I cubbed until 10:30 that night.

Q. And the next day what time did you start?

A. 6:30 a. m.

Q. How long did you cub?

A. I cubbed straight through until 6:30 the next morning.

Q. Did you cub a full shift each of the five days?

A. With the exception of the first one. They had been working some hour or an hour and a half. The job went out at 2:30 and I didn't go down there until about 3:30 or 4:00.

Q. Who told you where to go and what to do?

A. No one. Mr. Tommy Johnson—

Q. Who was he? Who is Tommy Johnson?

A. He is, I believe his title is chief clerk under Mr. T. C. Burton in the master mechanic's office. He gave me a slip of paper to be signed, authorizing me to ride the engines and to be signed by the regular fireman or engineer, or both.

Q. Did he tell you who to go with?

A. No, he didn't. He told me to go with anyone I wanted to. He only specified four different jobs for me to cub.

Q. How did he specify the four different jobs?

A. It seems there is a difference in the four different jobs and he wanted me to—

Q. What four jobs are those?

A. Well, one is firing the Diesel, steam engine—I mean the Diesel switch engine. Another is hostler helper, shop; another one is hostler helper, what they call the outside job, which is carrying passenger engines to the job and back to the shop. Another one is firing steam switch engine.

Q. And he told you that you would be required to cub all four of those jobs at one time or another during your cubbing period, did he?

A. Before I could go on the extra board.

Q. Did he tell you what time of the day to start?

A. No.

Q. How did you decide what time of the day to start?

A. Well, after I passed my medical examination I asked him where I should start or any particular one. He says for me to go out and take any one I wanted to at any time and work as long as I wanted to.

Q. Did you work eight hours?

A. The first day?

Q. I mean outside of that first day?

A. Yes sir, I did.

Q. What did you do when you were cubbing?

A. I rode with the regular fireman, learned the switches, learned the signals and learned the duties of a fireman in the operation of a Diesel engine.

Q. What duties are those?

A. There are some two or three valves to be turned on every hour and keep a watchout mostly for safety.

Q. What did you do on the steam engine?

A. On a steam engine practically the same duties. Of course, you have to keep watch up there for the crew and clean the deck.

Q. Shovel any coal?

A. Shovel plenty of coal, yes sir.

Q. How much of your time during the eight hours was spent in shoveling coal,

A. I imagine at least 50% or 60% of it anyway.

Q. How many days were you on a steam engine?

A. I was only on that one day cubbing.

Q. Did you do the same kind of work after you got through cubbing as you did while you were cubbing?

A. Yes sir.

Q. Was there any difference in the duties after you got through cubbing and the duties while you were cubbing as fireman?

A. No sir.

Q. You mean they were the same?

A. Yes sir.

Q. Except that you had someone with you when you were cubbing, is that right?

A. That is right.

Q. Now, the job of hostler helper, that is the job of bringing engines in and out of the roundhouse, isn't it?

A. Yes sir.

Q. What do you have to do in connection with engines when you would bring them out of the roundhouse?

A. Well, I had to make them ready for the road; had to first test and get sand and then coal, fill the water tank and then between the hostler and I, we see that the fire was in proper condition. Then take it from the shop up the engine lead to the terminal station and when a train

came in we would take the engine off of it and put the fresh engine on.

Q. And did you do that work while you were cubbing?

A. Yes sir, I did.

Q. While you were cubbing as hostler helper?

A. Yes sir.

Q. Did you have to fill the sand dome or whatever it is?

A. Yes sir.

Q. And this other work that you have described?

A. Yes.

Q. Did you ever get any pay for the time you spent cubbing?

A. No.

Q. Did you ever receive any?

A. No sir.

Cross-Examination,

By Mr. Whitwell:

Q. Mr. Redmond, I believe you say you went to work or got a job as yard fireman in January, 1943?

A. I believe that is right, approximately about that time.

Q. And you worked on that job until July, 1944?

A. I believe that is right.

Q. And then you quit?

A. Yes sir.

Q. And I believe you say you are working now at a grocery store?

A. Yes sir.

Q. Now, Mr. Redmond, you have been asked some questions about what you did while you were learning this job. Your cubbed with a regular fireman on each engine that you cubbed on, didn't you?

A. Yes sir.

Q. And the fireman of that engine, a regular employee, he told you the different things about the layout of the yard—you had to know that, didn't you?

A. Yes sir.

Q. You had to know the location of the switches and you had to learn a lot about signals, didn't you?

A. Right.

Q. And you had to learn a number of different tracks that you would go in and out?

A. That is right.

Q. You had to learn the location of industries where you would spot cars or pick up cars, is that right?

A. Well—

Q. You were strictly in the switch yards, not a passenger man?

A. That is right.

Q. I see. And you had to learn the different parts of this locomotive like the water gauge and how to fire the locomotive properly and keep from having too much smoke and have enough steam and not damage any of those different things?

A. That is right.

Q. Now, the regular fireman, he took pains with you and taught you those things, didn't he?

A. He did, yes sir.

Q. And after he had taught you those things, including the location of tracks and various things, he would then let you shovel in coal and learn the job, didn't he?

A. That is right.

Q. And that is the best way you know of learning a job quicker and faster, by doing it yourself?

A. I think so.

Q. And he would be standing there, watching you and telling you how to do that, wouldn't he?

A. Right.

Q. Did you do anything in connection with your cubbing for the position of fireman that the regular fireman was not there to do and paid to do?

A. No.

Q. Were you cubbing for your own benefit to learn the duties of the job that you wanted?

A. Evidently, yes sir.

Q. Did you have any control over the operation of that engine or any of its switching operations at all?

A. No, only the firing, and the water gauge, is all.

Q. Looking at those things in order to learn?

A. That is right.

Q. What I mean about that, you were not held responsible for the movement of that locomotive or anything like that, were you?

A. I don't think I was, no sir.

Q. That was the duty and responsibility of the crew itself, wasn't it?

A. That is right.

Q. You understood that, didn't you?

A. Yes sir, I did.

Q. When you first made out your application you understood that you wouldn't be paid during the time that you were cubbing for the job that you were seeking, is that true?

A. I was told that I wouldn't be paid.

Q. Wouldn't be paid?

A. Yes sir.

Q. And I believe you said you were not paid?

A. No sir, I was not.

Mr. Whitwell: In this connection I wish to call the Court's attention to our answer in which we freely admit that prior to December 1st, 1943 persons were not paid anything and this gentleman cubbed prior to that date, so our answer is clear as to our position why he wasn't paid.

Q. When you went on the seniority roster after—that was after you had completed your cubbing, wasn't it?

A. Yes sir.

Q. And when you went on the board that was after you had completed your cubbing?

A. Yes sir, it was.

Q. And you considered that your employment started after you had completed your cubbing?

A. Yes sir.

Q. Now, Mr. Redmond, what was your rate of pay which you received the first day you worked as an employee?

A. I don't remember exactly. I believe it was $6.59 or something like that. It has been raised since then.

Q. But you did draw, the first day you worked, the same contractual rate of pay that the other firemen employed in the yards drew, the same thing, didn't you?

A. According to the job I worked on. Each job has a separate certain rate of pay.

Q. According to your job, you drew the same rate of pay and the same wages, whatever you want to call it, that other men working that job drew who had probably been there ten years, is that true?

A. That is right.

Further this witness saith not.

Mr. Jansen: May I inquire of the Court what the Court's pleasure is about adjourning? I wanted to determine about what witnesses I should call.

The Court: It will be just about forty seconds until we adjourn. Call the last witness, the chief clerk. I want to ask him a couple of questions and then we will adjourn.

J. E. BORN, recalled for further examination, testified as follows:

By the Court:

Q. As to these posters, so called, who would post for a while and then come back, you have prepared pay vouchers for them all based on the rate of pay required by the Act here in question, the Wage and Hour Law?

A. Yes sir, they have prepared vouchers for them.

Q. About what proportion of them have been delivered and what proportion are undelivered?

A. Well, I don't actually pay these men these vouchers, checks, but the first list that came out I am pretty well familiar with because I talked to the paymaster there that had the checks. I delivered some of them myself and I would say about 75% of the first list has been delivered. In some instances—there are several of the boys overseas and some—

Q. Are you certain that pay vouchers have been prepared for them all?

A. Yes sir.

Q. Why didn't you mail them out to them?

A. It is against the Company's policy to mail a man his

check, as I understand it, unless he gives his written permission to do so because they change their address so much.

Q. As to these undelivered ones, they are on hand waiting for the former posters or men involved to come and get them?

A. Yes sir, and as soon as we can find out where we can locate them we try to notify them that there is a check waiting for them.

Q. How far back does that go? How far back did you go in writing these checks?

A. October, 1940. I believe that is correct.

Mr. Jansen: I would like to ask him one question.

Q. Have you included liquidated damages for an equal amount of these checks that you are giving in these cases?

A. Just what do you mean?

Q. Double damages. Are you giving them an extra amount?

The Court: No. I think we all understand they are just—

By Mr. Jansen:

Q. Just for this amount of forty cents an hour, is that right?

A. That is the way I understand it.

Further this witness saith not.

The Court: We will take a recess now until 10:00 in the morning. I want everybody to be punctual and be ready and have your next witness on the stand at 10:00 o'clock.

Thereupon Court adjourned until 10:00 in the morning.

On Thursday, May 17th, 1945 Court convened pursuant to adjournment, when the following proceedings were had:

Mr. Jansen: If it please the Court, at this time we wish to offer the deposition of John Harrison Whitten, who was general yardmaster of the Chattnooga Terminals, who has jurisdiction over the Chattanooga Terminal and who has

the power to hire and fire employees, and we offer his deposition as the deposition of an adverse witness. Now, I might point out to the Court that we haven't subpoenaed Mr. Whitten but I think I see him in the courtroom. However, we think that first of all we have the right to offer the deposition; secondly and more important, we think that it will save a lot of time if we are permitted to go along and read the deposition rather than to take up the time to examine him all over again.

The Court: I am more impressed with your second reason than with your first. Is there any objection to this deposition?

Mr. Whitwell: No.

The Court: I want counsel to understand that I wouldn't permit a deposition to be read of a witness who was sitting right in the courtroom if there is any objection but if there is not and it will save time, we will go ahead with the deposition.

Mr. Jansen: I am convinced it will save time, your Honor and I would like to ask that Mr. Cadra, my associate, be permitted to read the deposition.

The Court: All right.

(Deposition of John Harrison Whitten read.)

The next witness, CARL DURWOOD EASON, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your full name is Carl Durwood Eason?
A. Yes sir.
Q. How old are you?
A. Thirty four.
Q. Where do you live?
A. Chattanooga, 4400 Kirkland Avenue.
Q. How are you employed at the present time?
A. I work at the Hecules Powder Company.

Q. Were you ever employed with the NC&StL Railway?

A. Yes sir, I worked a year and twenty three days with them.

Q. Now, what kind of work did you do before you went with the NC&StL Railway?

A. I worked for the Hercules Powder Company, switching.

Q. You mean you had done switching for the Hercules Powder Company?

A. Yes sir, before I went with the NC&StL Railway.

Q. How long have you been with them, Mr. Eason?

A. I will say, just on a guess, about twelve or fifteen months, I think.

Q. Is there any difference in the actual switching work, outside of the layout of the yards and things, between the work you did as switchman at the Hecules Powder Company and the work you did as a switchman at the NC&StL Railway?

A. Yes sir. You don't have any main line trains to look out for at the Hercules Powder Company. It is all switching out there but you have to work trains on the north and south end of the NC&StL Railway.

Q. You mean you don't have main line trains to work with over there?

A. No sir.

Q. And you have a different layout of the yards, switch tracks and so on?

A. It is practically the same thing; it is all railroad yards.

Q. The actual physical work, is there any difference in that?

A. No.

Q. Now, before you started drawing pay from the NC&StL Railway were you required to go through a cubbing period?

A. Yes sir, I cubbed four days.

Q. Do you recall how much you cubbed each day?

A. Well, when I first hired Mr. Whitten told me I could either cub eight hours and make $5.00 or I could cub sixteen hours and make $10.00, so I doubled over two days,

making sixteen hours in two days and I worked eight hours the other two.

Q. And were you told where to go and when you were to cub?

A. Yes sir, they told me what crew to cub with.

Q. Who told you that?

A. The general yardmaster.

Q. What did you have to do as a cub?

A. Well, practically the same thing as switching. You had to learn the yard and your switch leads and how to bring an engine out from the shop to the job.

Q. Did you do any work as cub?

A. Yes sir.

Q. What did you do?

A. Well, after about the first couple of hours over there I did the switching just as if I had been on the board at that time.

Q. What part of the train were you on, the front end?

A. I was working with the engine, yes sir.

Q. Is that what you call the tailboard job?

A. That is the footboard.

Q. Was there somebody else on the footboard job?

A. Well, the biggest part of the time, yes sir.

Q. What would he be doing while you would be working switching?

A. Well, he would just stay on the engine. Lots of times he would get off and stand around where we were switching.

Q. Who threw the switches and coupled the cars and uncoupled them and cut them off and so on?

A. The footboard man and myself both. We were taking time about.

Q. You mean you would change about?

A. Well, some, yes sir.

Q. And you did all that work while you were cubbing in the yards?

A. Yes sir.

Q. How many different jobs did you work on?

A. I worked on all seven jobs. There are seven on each shift.

Q. So did you work seven different shifts?

A. Yes sir.

Q. And on two days you doubled over?

A. I didn't work seven different shifts. On the north end, I think I worked about two and a half or three hours down there and the foreman told me, he said, you can go ahead and cub on another job today because, he says, you know this job enough to get by with it.

Q. Who told you where to go then from there?

A. Well, I came back to the yard office and I worked the south end then the rest of the day.

Q. Who told you where to go?

A. Mr. Whitten.

Q. Did you speak to Mr. Whitten and he told you to go to the south end?

A. Yes.

Q. Now, did you ever get paid for the time you spent cubbing?

A. I got paid the eight hour days but I didn't get paid for the sixteen hours. He said that they had orders from Nashville that they couldn't pay but just for eight hours in one day.

Q. How many of these eight-hour shifts didn't you get paid for?

A. I would say three altogether. I was put on the board, I went to work at 2:30 and 10:30 and I was put on the board at 10:30 that night and I worked until 6:30 the next morning; and then doubled over again from 6:30 to 2:30 the next day.

Q. There was twenty-four hours continuous work there; counting in the eight hours cubbing, you worked a continuous shift of twenty-four hours, counting the eight hours cubbing?

A. Yes sir.

Q. You had started at 2:30 cubbing and cubbed that eight hours and then went on the board and worked for sixteen hours?

A. Yes sir.

Q. But you didn't get paid for the eight hours which you had cubbed?

A. That is right.

Q. Did you talk to anybody about that?

A. Yes sir. I was pretty sore about it and I went to the chief clerk and asked him.

Q. Who was that?

A. Johnny Born. I said, "I didn't get paid for the eight hours." He says: "Man, you are crazy. We couldn't afford to turn in a slip like that, you working twenty-four hours." He said: "I tore the slip up myself." I said: "Who gave you authority to tear it up?" He said he just couldn't turn it in.

Q. What did he mean, you couldn't work twenty-four hours?

A. There is a sixteen-hour law on the railroad and you are not supposed to work over sixteen hours.

Q. After you had finished this eight hours cubbing, starting at 2:30 that afternoon, were you told to report on these other jobs after you were on the extra board?

A. I didn't get your question.

Q. Who told you to report for extra work this last sixteen hours?

A. Mr. Whitten. They called me that night and told me that I would be put on the extra board at 10:30.

Q. Were you out cubbing at the time they told you that?

A. Yes sir.

Q. And they kept you working then a continuous shift of twenty-four hours?

A. That is right.

Q. And the first eight hours of that shift you were never paid for?

A. No.

Q. And then there were two other days?

A. Yes sir, when I made sixteen hours two days. They paid me for eight hours each day.

Q. Two different other days when you had worked two eight-hour shifts and they paid you for only one?

A. That is what I was cubbing, yes sir.

Q. How much did they pay you for this cubbing?

A. $5.00 a day.

Q. All the others that they paid for?

A. Yes sir.

Q. By the way, Mr. Eason, after you finished your cubbing did you have to take any kind of examination before you were put on this extra board?

A. No sir, I was put on the extra board but afterwards we did have a rule examination, I might say, about thirty days later.

Q. You were on the extra board working?

A. I had worked up to the time.

Q. During the time, from the time that you finished your cubbing and you spent those eight-hour shifts on the extra board, you worked pretty regularly, did you, up to the time when you took the examination?

A. Well, I made anywhere from, I will say, ten days to seventeen or eighteen days a half, something like that.

Q. And that was thirty days later that you took the examination?

A. I wouldn't be positive but just approximately.

Cross Examination,

By Mr. Whitwell:

Q. Mr. Eason, you say you worked as a switchman for the Hercules Powder Company before you made your application to the NC&StL Railway for position as switchman?

A. Yes sir.

Q. As a switchman for the Hercules Powder Company were you working with a crew with a steam locomotive?

A. No sir, we had Diesels.

Q. Is the Hercules Powder Company yard, is it the same yard or different from the—it is not the same yard as the NC&StL yard, is it?

A. No sir, it is a smaller yard, capacity there. They don't handle as much trains as the NC&StL Railway does.

Q. How much experience did you say you had had at the Hercules Powder Company and that operation switching before you came to the NC&StL Railway?

A. I said approximately twelve or fifteen months, I think.

Q. Now, while you were working with the Hercules Powder Company I take it that you learned quite a bit

about signals and about throwing switches and things like that in connection with yard operations?

A. Yes sir.

Q. So you had quite a bit of experience in switching in another yard before you came to the NC&StL Railway and filed your application?

A. Yes sir.

Q. Now, why did you make your application with the NC&StL Railway for position as switchman?

A. Well, at that time there was a reduction in force and I was going to be laid off and I filed application for a job with the NC&StL Railway.

Q. I don't recall whether you told me when you did your cubbing with the NC&StL Railway. When was that?

A. I was hired, I got an application January 5th and I believe started my cubbing on the 6th.

Q. Is that 1940?

A. 1945.

Q. Now when you made your application January 5th, 1945, did you talk with Mr. Born at that time or was it Mr. Whitten?

A. No sir, I talked to Mr. Whitten.

Q. Did you tell him at that time that you had had this prior experience with the Hercules Powder Company switching over there?

A. When I asked for the job I asked for a job switching. I don't believe that I mentioned that I was working with the Powder Company but I am pretty sure that he knew I was with the Powder Company.

Q. He knew you had had prior experience over there switching for the Powder Company?

A. Well, I imagine so, yes sir.

Q. Now, when you made this application you didn't understand that you were then an employee, did you?

A. Well, I figured I was employed when he gave me that application.

Q. You figured that filing the application employed you?

A. Yes sir, when I passed the physical examination.

I gave him my application, passed the physical and brought it back.

Q. Did he tell you then that you would have to go through a cubbing period to learn the yard?

A. Yes sir, he did.

Q. So you didn't consider that you were employed while cubbing, did you?

A. Well, I imagine so because I was working with the NC&StL Railroad.

Q. So you just thought you were employed from the time you signed that application, is that right?

A. Well, according to the way the seniority roster runs there. A boy they hired in the meantime, I had an application ahead of him and my seniority on the seniority roster was ahead of him.

Q. What seniority roster are you speaking of?

A. Seniority with the Railroad.

Q. What do you know about how that seniority list is made up and who makes it up?

A. Well, the seniority roster is made up by the Railroad Company and it is posted.

Q. Why, isn't it a fact that the seniority is made up by representatives of the employees' organization?

A. No sir, it is made up by the Railroad Company.

Q. Now, Mr. Eason, were you told when you made that application that you would have to go out on certain different parts of the yards and cub or train with the regular crew there in the yards, learn the location of the yards, switches and things like that?

A. Yes sir.

Q. You understood that all during your cubbing period you were out there for the purpose of learning the duties of a job that you were seeking? That is the truth, isn't it?

A. Well, to a certain extent, yes sir. I was learning the location of the tracks which different cars went in.

Q. And you went along with the crew that had regular switchmen, didn't it?

A. Yes sir.

Q. And you had two ground men, two ground switchmen, didn't you?

A. Yes sir, we have got a field man, footboard man and a foreman.

Q. And you had a conductor and an engineer?

A. Well, the foreman is counted—that is the conductor in the yard.

Q. Well, you had an engineer and fireman in addition to the foreman and two switchmen, didn't you?

A. Yes sir.

Q. Now, either the foreman or one of these switchmen or both would tell you, give you lectures or instructions as to the location and layout of the yards, wouldn't they?

A. Yes sir.

Q. And instructions as to the Company's signals that were regularly used there and given between the parties?

A. Well, they used standard signals. All railroads practically use the same signals.

Q. Now, what do you know about what signals—what kind of signals the Southern Railways uses?

A. Well, the rulebook is the same. You take an examination out of it and it has hand signals and lantern signals in there for the yard.

Q. Have you made a study of the rulebook of the Southern Railway?

A. Well, I have seen it. I have never studied it all the way through but it is a standard rulebook.

Q. When did you see it?

A. I couldn't tell you just exactly because I have seen rulebooks for quite a few years.

Q. Did you see those rulebooks of the Southern Railway before you came to the NC&StL Railway and made application or after you made application?

A. Well, I couldn't say that the book came from the Southern Railroad but each railroad uses the same book.

Q. Now, how do you know that?

A. There is standard signals, a standard rulebook.

Q. You know that the Illinois Central uses the same signals in their switch yards that the NC&StL Railway uses in its switch yards?

A. Well, they use standard signals.

Q. How do you know that?

A. I don't know.

Q. What makes you say it then?

(No response.)

Q. Sir?

A. It is a standard rulebook. Every railroad operates on standard rules.

Q. Where did you get that information?

A. Out of the rulebook.

Q. What rulebook?

A. The standard book of rules.

Q. You say that you have seen a standard book of rules that applies to railroad operations of every railroad in the United States, is that right?

A. Well, to my estimation, yes sir.

Q. Your estimation. Upon what do you base that estimation?

A. On the standard book of rules.

Q. Well, we come back to it. What made that book of rules standard?

A. I imagine it was drawn up for every railroad to operate by.

Q. All right. Now, you did understand, Mr. Eason, that you were out there, before you went on the seniority roster, that you were out there to learn the duties of the job for which you made application, didn't you?

A. Yes sir.

Q. And you understood that it was necessary for you to cub and learn those duties before you ever went on the roster of employees, didn't you? Tell me the truth.

A. Before I went on the board, yes sir.

Q. You understood that before you went on the board and went to work as an employee after going on the board that you would not draw the regular contractual rate that is applied to a switchman's job, didn't you?

A. For the cubbing period, $5.00.

Q. You knew, while cubbing, you wouldn't draw the regular rate that applies to employees after they qualify and are employed?

A. Yes sir.

Q. You knew that?

A. I knew I wouldn't get the standard rate of pay, yes sir.

Q. And you knew that you were out there training with a full crew, didn't you?

A. Yes sir.

Q. And you knew you were out there to learn in order to qualify for this, to qualify yourself to become a regular employee, didn't you?

A. That is right.

Q. And you knew you had to do this cubbing to learn the yards and these different things and practices, didn't you?

A. Yes sir.

Q. And you were shown those things and taught those things by members of that regular crew while you were cubbing, weren't you?

A. I was taught the markings of the cars, yes sir, and the tracks.

Q. You were shown how to throw the switches and where they were?

A. I knew how to throw them.

Q. It didn't take you long to catch on to that?

A. That is right. I only cubbed four days. I don't think it took me long.

Q. Now, during the period of your cubbing did you do one solitary thing in connection with your cubbing that the regular men were not there and paid to do?

A. The regular men was there but I switched.

Q. Well, in other words, if you hadn't been there the things you did would have been done by the regular men, wouldn't they?

A. That is right.

Q. Do you know anything that you did in connection with your training that wouldn't have been done by the regular men if you had never come there?

A. No sir.

Q. And the things that you did while you were cubbing were things that they were there to do and paid to do, weren't they?

A. That is right.

Q. Did you have a single, solitary duty or were you chargeable with a single, solitary duty or responsibility

in connection with the movements of that engine or any railroad operation while you were cubbing?

A. I wasn't responsible for it, no sir.

Q. That responsibility was with the crew, wasn't it?

A. That is right.

Q. Now, you say you cubbed the first day January 5th, is that right?

A. Now, from the best of my memory, I left the Hercules Powder Company on the 4th and I made application on the 5th and I believe it was the 6th that I started my cubbing.

Q. And you cubbed at various places in the yards for your own benefit to learn the duties of the position for which you had applied in the yard, didn't you?

A. Yes sir.

Q. And you said something about you were paid $5.00 a day for your cubbing. Now, you cubbed how long, you say, the first day?

A. Sixteen hours.

Q. Now, you cubbed sixteen hours that day in order to learn the yards quicker so that you could go on the roster of employees quicker, didn't you?

A. Yes sir. I worked and learned the job and to make the extra $5.00 too on that.

Q. You learned, of course, before you came down there that the Railroad was paying $5.00 a day to cubs while they were cubbing, didn't you?

A. No. I didn't think they paid anything. I applied for the job and Mr. Whitten told me Tommy was allowed to pay $5.00 a day.

Q. That they were allowed to pay you $5.00 a day during the period of your cubbing?

A. Yes sir.

Q. You knew that that wasn't the rate you would get after you became an employee, didn't you?

A. Yes sir.

Q. And you cubbed those sixteen hours on one or two different days for your own benefit to learn quicker how to get to your job that paid more than $5.00? That is the truth, isn't it?

A. Yes sir.

Q. And you knew the sooner you got through with your cubbing you would become an employee and draw this contractual rate of pay, didn't you?

A. I knew just as soon as I completed my cubbing I would be put on the board as a switchman.

Q. And draw this regular switchman's rate?

A. Yes.

Q. Now, the regular switchman's rate doesn't apply and is not paid to a person while cubbing, is it?

A. No.

Q. Do you know what that is?

A. Well, I imagine because he is not a qualified switchman.

Q. Isn't it because he is not an employee until he gets upon the roster of employees?

A. Well, I don't know about that.

Q. And haven't you learned, Mr. Eason—

Mr. Jansen: May it please the Court, I think that last question—I haven't stopped counsel up to now, but I think that is highly argumentative.

Mr. Whitwell: I don't think so.

The Court: This is cross examination. Overruled.

Mr. Jansen: All right.

By Mr. Whitwell:

Q. —and if you didn't know it then, didn't you learn it soon afterwards, that the regular rate of pay which is paid to an employee after he comes upon the roster is more and different from the amount that the Company pays to persons while cubbing?

A. Yes sir, it is more than the cubbing pay is.

Q. Didn't you learn, if you didn't know it beforehand, that your standing on the board or on the seniority roster of employees did, at least for some period, begin some period after you had completed your cubbing?

A. Well, my seniority started on the 9th on the roster.

Q. Started on the roster on the 9th. Well, it was after you had completed your cubbing, wasn't it?

A. Yes sir.

Q. And you cubbed four days?

A. Yes sir.

Q. And you were paid $5.00 a day for four days, weren't you?

A. Yes sir. I cubbed four straight days, but I worked sixteen hours two days. It amounted to six days cubbing, that is, eight-hour days.

Q. But anyway, regardless of the number of hours that you cubbed in any one day, you cubbed four days and were paid for four days, weren't you?

A. I was paid for four eight-hour days.

Q. You were told when you started cubbing that you would be paid $5.00 a day for cubbing?

A. I was told I would be paid $5.00 for eight hours, or I could work sixteen hours and make $10.00, but I later found out that the Company didn't allow them to pay more than eight hours in one day.

Q. You later found out that the information given you there as to the sixteen-hour days was an error and that the Company did not allow $10.00 a day instead of $5.00, is that right?

A. I imagine Mr. Whitten misunderstood about that. He was honest in his opinion, but the Company didn't allow it.

Q. And so you got paid for all that you understand the Company allowed under its policy of paying $5.00 a day?

A. Yes sir.

Q. And you say you got mighty sore?

A. Yes sir, it made me sore when I doubled over there two days there and didn't get paid for it.

Q. Or did you quit?

A. No.

Q. Are you working for the Company now?

A. No sir, I work for the Hercules Powder Company.

Q. What brought about your severance from the Company?

A. Well, the foreman and myself got into a stir and he cursed me and I hit him and they discharged me.

Q. You are the man that got into a fight up there and hit the foreman?

A. Yes sir.

Q. How long had you been working for the Company before you hit that foreman?

A. I was fired out of the service at 2:15 on the 23rd of January and that made me twelve months and twenty-three days.

Q. Now, that man that you hit was an old man, old man Hamblen?

A. No sir.

Q. Who was it?

A. George Norvell.

Q. What age man is he?

A. Well, I don't know his age.

Q. Well, give us some idea. I am just curious to know.

A. Well, I would say around, I imagine pretty close to fifty years old.

Q. Fifty years old?

A. Yes sir.

Q. What was your age at the time?

A. Thirty-four.

Q. Thirty-four. Was he a smaller man or larger man than you?

A. He was smaller than I am.

Q. About what would he weigh?

A. I imagine about a hundred and forty or forty-five, something like that.

Q. How much do you weigh?

A. Two hundred and twenty.

Q. Now, before you were discharged for hitting that old man were you given notice of a hearing?

A. Yes sir.

Q. Did you understand that you, as an employee, were entitled to a hearing under the agreement between the Company and its employees?

A. Yes sir.

Q. Were you given a hearing?

A. Yes sir.

Q. Did you appear at your hearing?

A. Yes sir.

Q. Were you told that you might have a representative of your own choosing there?

A. If I wanted it, yes sir.

Q. Did you want it?

A. No sir.

Q. You represented yourself at the hearing?

A. Yes sir.

Q. Did you admit at the hearing that you hit this old man?

A. Yes sir.

Q. Were you discharged after that hearing?

A. Yes sir.

Q. Did you appeal from that notice of discharge or the action of the Company in discharging you? Did you appeal to the General Manager or to the National Railroad Adjustment Board in Chicago?

A. I went to Mr. Tucker's office three or four times and I didn't never get to talk to Mr. Tucker. I didn't go to Mr. Hale.

Q. I am asking you if you appealed?

A. I appealed to the Brotherhood, yes sir.

Q. You appealed to the Brotherhood?

A. Yes.

Q. Did the Brotherhood appeal to the National Railroad Adjustment Board?

A. I think it was the general committee.

Q. Appealed to a committee?

A. Yes.

Q. You never did go to the National Railroad Adjustment Board with your appeal or claim, did you?

A. I don't know. Mr. Thacker was handling that.

Q. Do you know whether the claim was ever filed with the National Railroad Adjustment Board asking that you be reinstated or that you were wrongfully discharged?

A. Well, I had a letter from Mr. Thacker stating he had appealed to this committee.

Q. This railroad committee?

A. Yes sir.

Q. I am talking about the board in Chicago.

A. I couldn't say.

Q. You didn't appeal because you knew you were wrong in hitting that old man, didn't you?

A. Well, I don't think I was wrong now. He cursed me and I hit him.

Q. If you had hit the old man before you became an employee and while you were cubbing do you know whether or not you would have had the right of notice of a hearing or any hearing at all?

A. I imagine I would have been fired just like I was.

Q. You don't know whether that appeal system applies to cubs or not?

A. No sir, I don't.

Q. Well, you say you were sore back then. Are you sore now?

A. No sir.

Q. What got you in such a good humor?

A. They did me a favor when they discharged me.

Q. So you got to liking them for discharging you?

A. Yes sir.

Q. Happy over it?

A. I am making more money out of the job I am doing now.

Q. And the same thing that got you mad, got you in a good humor, is that right?

A. You know, a fellow sometimes has to be big enough to kinder take the bitter with the sweet.

Q. Do I understand you to say that the last day that you cubbed you were with the engine sixteen hours, or on the last day that you were there sixteen hours that you worked as a regular employee the last sixteen hours on that day or eight hours?

A. You see, I cubbed eight hours that day and was put on the board at 10:30.

Q. In other words, the first eight hours that you were out there, is that time you were there cubbing?

A. That is right.

Q. And you were put on at 10:30?

A. Yes sir.

Q. On the extra board of employees?

A. That is right.

Q. And at 10:30 you became an employee and went to work more hours that day as an employee?

A. Yes sir.

Q. You were paid $5.00 for that first eight hours work for cubbing, weren't you?

A. No, they didn't turn that day's cubbing in because I worked twenty-four hours without going off.

Q. Worked twenty-four hours?

A. Yes. I cubbed from 2:30 to 10:30 and was put on the board at 10:30 and worked until 6:30, and then I worked in District No. 6 from 6:30 to 2:30 that afternoon.

Q. Anyway, this sixteen hours that you talk about, how much compensation did you draw from the Railroad Company for that sixteen hours?

A. I only drew $5.00 a day.

Q. That last day?

A. For cubbing, yes sir.

Q. I say you drew that last day $5.00 for the time you cubbed?

A. I wasn't paid for the eight hours cubbing that I worked in the twenty-four-hour period. The time slip was torn up, not turned in for that day's cubbing.

By the Court:

Q. Well, what were you paid for on that day?

A. I was paid sixteen hours on that day.

Q. At what rate, the regular contract rate?

A. The standard rate of pay, yes sir, $8.50 a day.

Mr. Whitwell: Sixteen hours.

Redirect Examination,

By Mr. Jansen:

Q. Counsel asked you something about these rules and you said they were more or less standard. Can you give some illustration of that?

A. Well, just standard operating rules on the back and it has got marked on it "Standard Rule Book", standard book of rules, I believe.

Q. What are some of the rules, just briefly?

A. You mean any portion?

Q. Yes, just an example.

A. You take, for instance, the fixed signals like indicating different movements of a train.

Q. Is that standard for all railroads?

A. And there is the question: What is a train? It is one engine or more than one engine coupled with or without cars, displaying markers.

Q. Is that standard generally as to all railroads?

A. Yes sir.

Q. Counsel also asked you about this occasion when you struck this man, you say, who was your foreman. What was the occasion of that?

A. He cursed me.

Q. What did he call you?

A. He called me a G. D. S. B.

Q. How many times did you strike him?

A. I just struck him once.

Q. I am not sure that I know what a G. D. S. B. means.

A. He called me a God damned son of a bitch.

By Mr. Whitwell:

Q. Was once sufficient?

A. Yes sir.

Further this witness saith not.

The next witness, WALTER BENJAMIN BOYD, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your full name is Walter Benjamin Boyd?

A. Yes sir.

Q. How old are you, Mr. Boyd?

A. Fifty three.

Q. Where do you live?

A. Chattanooga.

Q. How are you employed?

A. By the NC&StL Railway.

Q. In what capacity?

A. Switchman.

Q. Now, where were you employed before you were employed with the NC&StL Railway?

A. I was working for the Savannah Machine & Foundry Company in Savannah, Georgia.

Q. When did you start with the NC&StL Railway?

A. Let's see. I can't remember the date. I had it down here on a piece of paper. I began work in the shop.

Q. When was that?

A. In September, 1943.

Q. September, 1943?

A. Yes.

Q. Now, had you had any previous railroad experience?

A. Yes sir.

Q. And what was that?

A. I worked for the Marion & Eastern Railroad Company.

Q. Where is that located?

A. Marion, Illinois.

Q. What did you do there?

A. Switching.

Q. Any other?

A. No. That is, outside the Tennessee Products Company. I worked there two years.

Q. What kind of work did you do there?

A. Switching.

Q. So you had had previous railroad experience with the training with the Marion and Eastern Railroad and the Tennessee Products Company?

A. Yes sir.

Q. Now, when you went to the NC&StL Railway you first started in the repair shop?

A. In the repair shop.

Q. What do they call that?

A. They call it the Rip track, some of them, and some of them call it the repair track. Some of them call it the hammer track.

Q. Did you apply for such a position?

A. I did.

Q. And when did you start switching?

A. Well, I had the dates all down but my two kids got hold of the dates and tore them up, but the best I re-

member, I worked about three months on the hammer track and before that time had put in an application for switching.

Q. I see.

A. And then Mr. Whitten run short of switchmen and he asked me one day how about going to switching and I told him all right, it didn't make any difference to me one way or the other so he asked me to go down and learn the tracks in the yard. Of course, I had previous experience switching but I had to learn the tracks of the yard. I had to work on the hammer track in the daytime from 8:00 to 4:00 in the afternoon and then I would go either to one end of the yard or the other to learn the tracks in the afternoon when I would get off from work.

Q. How long did you work at that learning the tracks?

A. About five days.

Q. How many hours a day?

A. I got off about 4:00 and then worked until dark because they didn't have any lights and they didn't care to put me to work at night anyway. So I just worked until dark and then go home.

Q. Can you give me any idea about how many hours that would have been each of the five days? Was that in the winter or summer?

A. It was in the winter; about three or four hours.

Q. Three or four hours for five days and at the end of that time did you go to switching?

A. Well, I don't just remember what day it was that I went to switching. I had the dates down but the kids tore them up.

Q. Well, you worked on the Rip track or the Hammer track, and while you were learning the tracks did you do anything at all about switching?

A. Yes sir, I helped the boys switch down there.

Q. Did you go on with some regular crew?

A. Some regular crew, yes sir, on the south end and on the north end.

Q. Any other place?

A. Well, no. They said it wasn't necessary for me to work on the other tracks because I already had experience in switching. They said just learn the tracks; that is all I needed.

Q. How long after that, approximately, was it that you went to switching?

A. Well, I believe it was on the fifth day. I am not for sure. They put me on the board at 4:00 o'clock and I was called at 4:10.

Q. On what date?

A. On the 5th, I believe; I am not sure.

Q. Of what month?

A. Let's see. I believe that was in December.

Q. 19—what?

A. 1943.

Q. Now, did you ever get paid for any of that time you spent after hours when you were working on the Rip track and then went on the crew and worked at switching?

A. No.

Q. Would you call that cubbing?

A. Well, I don't know whether you call that cubbing or not but I imagine it would be cubbing the tracks and learning the locations of the yard.

Q. Did you do any work with the crew when you were doing that?

A. Yes sir, I helped them out.

Q. In coupling, uncoupling and so on?

A. I followed the engine and cut cars. You see, the field man works in the field, and the conductor lined the switches and gave me a signal how many cars to cut off.

Q. Now, from that time on the 4th or 5th of December, have you worked continuously for the NC&StL Railway as switchman?

A. No.

Q. How long did you work as switchman?

A. I worked there six or seven months and I quit.

Q. Six or seven months and quit?

A. Yes sir.

Q. And during those six or seven months were you on the extra board or regular?

A. On the extra board.

Q. And on the extra board did you cover all these different shifts that have been talked about in Mr. Whitten's deposition?

A. When they put me on the board they called me that afternoon at 4:11 and I worked until 10:30 and got eight hours for that. I went right on with the regular work.

Q. And then for six or seven months?

A. Yes sir.

Q. And then on the different jobs that have already been described through Mr. Whitten's deposition, did you work on each one of those jobs at one time or another?

A. I have worked on all of them.

Q. And then you quit?

A. Yes.

Q. Did you go back to work for the Railroad again?

A. Yes sir.

Q. When was that?

A. Well, I went back and made out an application to Mr. Whitten and he told me he would give me my job back and I went in, I believe it was 1/11/45 and I cubbed nine days again.

Q. You mean you cubbed nine days again?

A. Yes sir, 1/11/45,—from 1/11/45 to 1/19/45.

Q. And when you cubbed did you do the work of a switchman?

A. I helped out just like I did before.

Q. Did you cover the different shifts?

A. On two occasions I did. Mr. Whitten said he had two—no, he had four men; that he had put two on the board of ahead of me that had been cubbing previous to the time when I came back. Of course, I didn't have no objection to that. I knew I was a new man coming back. I lost my seniority, so I—he said he would put me on cubbing so as to keep in touch with me and give me something to do until he got these men—he got an opening for me back on the board.

Q. And you cubbed for nine days?

A. Yes sir.

Q. Was there any difference in the yards between the time you had worked for them for this six or seven months and the time you cubbed this nine days?

A. Six months.

Q. Was there any difference in the layout of the yards?

A. No sir.

Q. Was there any difference in the kind of work that you did?

A. Oh, you mean now?

Q. Yes sir.

A. The same thing.

Q. Is there any difference in the kind of work you did when you were cubbing and the work you did when you were down there previously for six months?

A. No sir.

Cross Examination,

By Mr. Whitwell:

Q. Mr. Boyd, if I understood you correctly, you worked out in the shops on what you call the Rip track?

A. The Hammer track. I call it the Rip track.

Q. That was the repair shops, wasn't it?

A. Yes sir.

Q. Did you say you started to work there in September, 1943?

A. Yes sir.

Q. And how long was it—how long had you been working there as an employee in the shop until you began picking up this cubbing for the switchman's job in the yards at odd times?

A. Well, the best of my memory—I lost my records that I kept—it was between two and three months.

Q. Now, do you recall what month it was that you began cubbing there after you would get off from work out at the shops and cubbed in the yards for this switchman's job?

A. Well, I went to work there in September, the month of September.

Q. That was at the shops, wasn't it?

A. That was at the shops, yes sir.

Q. How long after that was it that you began cubbing after you would get off from work at the shops?

A. Well, it was around two months or two and a half months, something like that.

Q. So you began your cubbing to qualify yourself for a job as switchman somewhere around the latter part of November or December?

A. I believe it was, yes sir. I am not positive.

Q. Well, as a matter of fact, you started your cubbing there for the switchman's job now the first of December, 1943, is that right?

A. Yes sir.

Q. And that would be after you would get off from work out at the shops?

A. That is right.

Q. You would get off from work out at the shops at 4:00 o'clock?

A. Yes sir.

Q. And then you would come over to the yards and cub there from 4:00 o'clock until dark?

A. Yes sir.

Q. And so in December, 1943, dark would come about between 6:00 and 6:00 o'clock, wouldn't it?

A. I guess it would.

Q. You wouldn't get much time each day after you got off from work, you didn't have much time to learn the yards?

A. No.

Q. But you did go over there and learn the yards because you wanted a job sometime as switchman, didn't you?

A. I had done made application already.

Q. You had made your application?

A. Yes sir.

Q. You had to pick up this cubbing at odd times?

A. Of the yards, yes sir.

Q. Mr. Whitten was very nice to you about it?

A. Yes sir.

Q. And permitted you to come over there at your own pleasure and do this cubbing, didn't he?

A. Yes.

Q. And you were coming over there and learning that for your own benefit so that you could get a job later?

A. Yes sir.

Q. You were trying to qualify for that job that you had applied for?

A. Yes sir.

Q. That is the truth, isn't it?

A. Yes.

Q. So you cubbed a few hours along on different days after getting off your regular job and it was in that way that you learned the duties of the position which you later acquired?

A. Yes sir.

Q. Now, do you recall when it was that you first began working for the Railroad Company as a switchman employee? When you finished your cubbing, that is what I am getting at, Mr. Boyd.

A. Well, I had worked out at the shop—I was working at the shop at the time that they called me. I believe it was Mr. Born—I am not sure. He called me in the office in the afternoon and told me, gave me the keys, rule-book and timetable and told me that I had better go home and get some rest; that they might call me and I was in the bathhouse getting ready to go home and Mr. Finney, one of the foremen, came after me at 4:10 and I was put on the board at 4:10 and went to work that afternoon and I worked until 10:30.

Q. Now, Mr. Boyd, while you were working out there at the shop just tell us what was your rate of pay out there.

A. Let's see, I just don't remember. I believe it was 78 cents an hour and a penny an hour for punching the clock, made it 79 cents an hour. I believe that is right.

Q. And that was for eight hours?

A. Yes sir.

Q. And if you worked overtime over eight hours you got overtime?

A. Time and a half.

Q. Now, during this time that you spent over there cubbing for the position of switchman did you keep any account of the hours you spent switching? Did you turn in anything for any time while switching?

A. No sir. They wasn't paying any cubbing wages at that time.

Q. In other words, you did your cubbing for the position of switchman before they began this policy of paying cubs $5.00 a day?

A. Yes sir.

Q. You understood that too while you were cubbing?

A. Yes sir.

Q. That you were to receive nothing during the period of your cubbing?

A. Yes sir.

Q. You understood that fully?

A. Yes sir.

Q. When you would go over there I take it you would cub with the regular switch crew there somewhere in the yard?

A. Yes sir.

Q. And some member of that crew would teach you the location of the switches and location of the tracks?

A. Yes sir.

Q. And the routine work that a switchman has to know?

A. That is right.

Q. After he is an employee?

A. Yes sir.

Q. That is the truth, isn't it? And they took time to teach you those things?

A. Yes sir.

Q. And you were over there for your own benefit, weren't you, to learn?

A. Yes sir.

Q. You wanted the job, didn't you?

A. Yes sir.

Q. And you got one, didn't you?

A. I think I did, yes sir.

Q. Now, at the time you were over there cubbing, Mr. Boyd, throwing switches and things like that, did you do anything that the regular switchmen weren't there to do and paid to do?

A. Oh, yes.

Q. I mean by that, did you do anything that the regular switchmen wouldn't have done if you hadn't been there?

A. Oh, no sir, no, no.

Q. If you hadn't been there the work would have gone on just the same. And they let you throw switches and perform different things, different duties in order that you might learn how to do them yourself?

A. If you don't get the actual experience you won't know it.

Q. And that is why they let you do those things?
A. Yes sir.
Q. And that is why you did them and wanted to do them, isn't it?
A. Yes.
Q. And if you hadn't been there he would have done them?
A. Yes sir.
Q. And every thing that you were doing there to learn was something that he was being paid to do?
A. Yes sir.
Q. That is true, isn't it?
A. Yes sir.
Q. And you learned that lots better after you became an employee than you realized while you were cubbing, didn't you?
A. Well, I was already experienced in switching; I didn't have to cub on that. The tracks was the only thing I had to learn.
Q. Now, Mr. Boyd, I think I understand you and I thought your statement was very fair, if I did understand you. After you had worked a while there as an employee, switchman, in the yard, I believe you stated you quit work.
A. Yes sir.
Q. And then you went and got a job somewhere else, didn't you?
A. Hercules Powder Company.
Q. They pay pretty good?
A. They don't pay as much as they do there, no sir.
Q. But you decided you wanted to quit and you went and hired to the Powder Company and worked for them?
A. As switchman, yes sir.
Q. Then sometime later, Mr. Boyd, you came back to Mr. Whitten and told him that you were sorry that you quit and that you had made a mistake?
A. Yes sir, I did.
Q. And that you wanted to go back to work?
A. That is right.
Q. Well, when you quit you knew, of course, that by reason of quitting you had lost your seniority?
A. Yes sir.

Q. And that when you came back and wanted to go back to work Mr. Whitten said to you: "Mr. Boyd, I haven't got room for you now on the extra board If I put you on I will just have to take you off and it wouldn't do you any good", didn't he?

A. That is right.

Q. And when you came back and had this conversation with Mr. Whitten the Company had by that time adopted the policy of paying persons $5.00 a day while cubbing?

A. Yes sir.

Q. And didn't you say to him: "Well, if you have got no place for me on the extra board it won't hurt me there, and suppose you let me cub a few days?

A. Mr. Whitten suggested that himself.

Q. Did he?

A. Yes, sir.

Q. He said to you: "Now, I can't work you as an employee"?

A. That is right.

Q. "But if you are interested in it, I will let you cub a few days"?

A. That is right.

Q. "It pays $5.00 a day for cubbing"?

A. Yes sir.

Q. And you thoroughly understood about that, didn't you?

A. I did, yes sir.

Q. He was doing that for your benefit, wasn't he?

A. Yes sir.

Q. And you don't complain about that now, do you?

A. I haven't got any right to.

Q. That is right. So that is all there was to this nine days cubbing that Mr. Jansen asked you about, isn't it?

A. Yes sir.

Q. And it was for your accommodation?

A. I guess so, yes sir.

Q. And you were paid for every one of those nine days?

A. Yes sir, nine days

By the Court:

Q. How many hours did you work as a cub?
A. Eight hours.

Redirect Examination,

By Mr. Jansen:

Q. You say you worked eight hours for this nine days as a cub?
A. Eight hours a day, yes sir.
Q. Tell me again, what was the reason why you were not put on the extra board immediately.
A. Well, Mr. Whitten explained it to me, that he had four men that cubbed ten days ahead of me.
Q. I see.
A. And he was holding me off to put those four men on the board ahead of me. There was four men ahead of me.
Q. So the real reason you had to cub was that he wanted to put four men ahead of you?
A. Yes sir.
Q. So you would have to cub until those four men could be cubbed and then you would be put on the extra board?
A. Yes sir.
Q. Did you go to work immediately when you were put on the extra board?
A. Yes sir.
Q. If you had been put on the extra board when you first went to Mr. Whitten you could have gone to work immediately, couldn't you?
A. Sure.

Further this witness saith not.

The next witness, S. B. CHAMBERS, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your name is Samuel B. Chambers?
A. Yes sir.

Q. How old are you?

A. Forty.

Q. Where do you live?

A. 119 East Nineteenth Street, Chattanooga.

Q. How are you employed now?

A. Stone-Webster Engineering Corporation.

Q. Were you ever employed by the NC&StL Railway?

A. Yes sir.

Q. When was that?

A. The 26th day of November, 1943.

Q. The 26th day of November, 1943?

A. Yes, sir.

Q. Now, Mr. Chambers, where did you work before you worked for the NC&StL Railway?

A. Stone-Webster Engineering Corporation.

Q. What kind of work did you do for the NC&StL Railway?

A. Switchman.

Q. Before you went on the extra board as switchman were you required to do any sort of cubbing?

A. Yes sir, nine days.

Q. Now, will you tell us in a general way what you did when you were cubbing?

A. When I started cubbing I worked the footboard, throwing switches, giving signals, pulling pins and uncoupling cars.

Q. Did you do that the first day you were cubbing?

A. No sir.

Q. How long after you first started?

A. The second day.

Q. What was the other man on the footboard doing when you were coupling and uncoupling and signalling?

A. He was doing the same thing. He was on the south end on the second day that I pulled pins and came out with a long cut of cars and early in the morning they couldn't clearly see and he would send me back to pull pins.

Q. Was anyone with you when you were pulling pins back there?

A. Yes sir, the other footboard man.

Q. Now then, what did you do the next day?

A. The next day I was on the south end and did the same thing. I stayed there three days.

Q. And did you do certain work in connection with the switching while the footboard man was doing the same thing?

A. Yes sir.

Q. Was he with you all the time?

A. All the time.

Q. Now, how about later on in your cubbing?

A. Well, the same way; they was always there when we were on the footboard with them.

Q. Did he hold the iron that you used to pull pins with at the same time?

A. Oh, no, no. You had to pull the pins yourself.

Q. You had to do the work yourself?

A. Yes sir.

Q. Did you see any difference between that work you were doing when you were cubbing and the work you did after you were on the extra board?

A. The same thing.

Q. How many hours a day did you work?

A. Eight.

Q. Who told you when to start?

A. Mr. Whitten.

Q. Who told you where to start?

A. Mr. Whitten.

Q. Did you work full eight hours there every one of those nine days?

A. With the exception of one.

Q. What day was that?

A. That was one morning it was foggy and they wouldn't let me go and work a full day.

Q. Was that early in your cubbing or later in your cubbing?

A. It was the fourth day.

Q. How many hours did you work that day?

A. About seven.

Q. Did you ever get paid for any of this cubbing?

A. No sir.

By the Court:

Q. Well, was it prior to December, 1943?

A. It was in November, 1943.

By Mr. Jansen:

Q. Now, did you cub the different shifts during the time while you were doing this cubbing?

A. Yes sir.

Q. Did you cub more than one shift in the day?

A. Yes sir, one time.

Q. What day was that?

A. It was on the sixth day. I worked the first trick and doubled back to the second.

Q. That day how many hours did you work?

A. Sixteen.

Q. So, as a matter of fact, you worked ten different shifts, is that right?

A. Nine.

Q. In nine days you worked ten shifts?

A. That is right.

Q. Now, was anything said to you when you were put on the extra board, did anybody talk to you about going on the extra board or anything like that?

A. Yes sir.

Q. What was that?

A. The yardmaster. I went to him on the ninth day and asked him when they was going to put me on the board and he says: "I asked Mr. Whitten and he said: 'Go on the board tomorrow'." Mr. Britton.

Q. Did you take any kind of examination between the time you cubbed and the time you went on the extra board?

A. No.

Q. Did you ever take an examination?

A. Yes sir.

Q. When was that?

A. About six months prior, after I went on the board.

Q. You mean six months after you went on the extra board you took an examination?

A. Yes sir.

Q. Did anybody sign anything for you when you went on the extra board or anything like that?

A. Not that I know of.

Q. I mean you didn't have any paper for somebody to sign?

A. No sir.

Q. Each time you finished a different shift did the foreman sign anything for you?

A. Yes sir, he signed a card that I had.

Q. A card?

A. Yes sir.

Q. What did that say?

A. It didn't say a thing in the world. They told me to take it and have each foreman that I worked with to sign the card.

Q. Did you do that?

A. Yes sir.

Q. And he signed it when?

A. At the end of the shift.

Q. After you had put in eight hours?

A. After I had put in eight hours.

Q. And on that day when you put in sixteen hours did two different foremen sign it?

A. Yes.

Cross Examination,

By Mr. Whitwell:

Q. Mr. Chambers, just a few questions. This card that you signed, that was a card showing the crew with whom you cubbed that day, wasn't it, and the foreman just endorsed his name upon that card and "O. K." that you had cubbed with his crew that day?

A. That is right.

Q. Now, I think it is clear but if I understood you correctly, you went on the board or extra board, whatever they call it, as an employee November 26, 1943?

A. That is right.

Q. That is when you went to work as an employee, wasn't it?

A. That is right.

Q. And, of course, your nine days cubbing was before that?

A. Yes sir.

Q. And after you had cubbed nine days you had some talk with Mr. Whitten about when you might expect to be put on as an employee and he said: "Well, start tomorrow", is that right?

A. Yes.

Q. Now, I take it, Mr. Chambers, that you made your application there for a position as switchman because you wanted a job later on as switchman after you had cubbed and trained and learned the yards and things like that?

A. That is right.

Q. And when you made your application, I take it, it was explained to you and you understood that you would have to cub there and learn the yards and learn how to throw switches, the location of signals and things like that in order to qualify for the job you had applied for?

A. That is right.

Q. That is the truth?

A. That is right.

Q. Now, during those different days when you were cubbing there you understood that you were not being paid anything until after you had gone on the board and on the seniority roster as an employee, didn't you?

A. Yes sir.

Q. You knew that before you cubbed a single day, that you were not being paid anything for the time that you spent in cubbing, learning the job that you later expected to get?

A. That is right.

Q. That is the truth. Now, while you were cubbing, Mr. Chambers, you cubbed with a regular crew there in the yard, different crews, of course?

A. Yes sir.

Q. And that would consist of an engineer, fireman, a switch foreman and two regular brakemen?

A. Switchmen.

Q. And you started off, I believe you said, as front footboard man?

A. Yes sir.

Q. There was a regular employee there whose job was the front footboard man's job?

A. Yes sir.

Q. And he assisted you in giving you instructions about the yard and the layout, how to throw switches and various signals and other duties that you went out there to learn so as to become an employee later on?

A. That is right.

Q. And the first day I believe you said he didn't let you do much, if anything. The first day you listened to him and watched him do those things, didn't you?

A. That is right.

Q. And after you had watched him throw the switches and had listened to his lesson, so to speak, to you about the yards and different things that you would have to learn, why, later on he let you begin to throw switches and do the different things that he was there to do and paid to do, that is right?

A. Yes sir.

Q. And you understood that he was letting you do those things for your benefit in order that you might better and quicker learn the duties of the job that you had applied for. That is the truth, isn't it?

A. That is right.

Q. And you didn't do anything while you were cubbing out there with the regular man that the regular man wasn't there to do and paid to do, did you?

A. No sir.

Q. And you had no duty and no responsibility about the operation of that crew or what it did, or any other railroad operation while you were cubbing, did you?

A. Not a bit.

Q. That duty and that responsibility was with the regular employees, wasn't it?

A. Yes sir.

Q. Now, it was necessary to cub at different places around the yards and learn different switches and different locations in the yards, wasn't it?

A. I covered the whole job.

Q. And it was necessary for you to do that to learn the different locations and switches that you would be

called upon to have contact with after you became an employee, that is the truth?

A. That is right.

Q. And you say usually you would cub regular eight hours?

A. All except one day.

Q. One day it was foggy and you just cubbed seven hours that day, I believe you said, as I understood that, and that was for your benefit, wasn't it?

A. Every bit of it.

Q. You could, while cubbing you could cub four hours and quit if you had wanted to, couldn't you?

A. Well, I wasn't supposed to.

Q. You just didn't want to; you wanted to cub just as much as you could and learn as fast as you could?

A. That is right.

Redirect Examination,

By Mr. Jansen:

Q. Mr. Chambers, did anybody ever tell you you could come late?

A. No sir.

Q. Did anybody ever tell you you could go home early?

A. No.

By the Court:

Q. Well, did anybody tell you when to go or come or did you go and come when you pleased?

A. I went to work when the crew did that I was with and quit when they quit.

Q. Well, you just went right straight through with them?

A. That is right.

By Mr. Whitwell:

Q. The hours you reported was voluntary on your part, wasn't it?

A. Yes sir.

By Mr. Jansen:

Q. You were told what crew to report with?

A. Yes.

Q. And what time to report?

A. That is right.

Q. And were you notified you could leave earlier?

A. No.

Q. Did anybody ever tell you you could come in at 12:00 o'clock on the 6:30 crew?

A. No.

By Mr. Whitwell:

Q. Mr. Chambers, just a question or two along that line. While you were told what crew or crews it was desired that you cub with so that you could better learn the different places in the yards, you were never told if you didn't cub with a certain crew or cub on a certain day you couldn't cub any more, were you?

A. No.

Q. And you did understand that if you were out there cubbing with a certain crew today and if for some reason you didn't wish to show up or couldn't show up tomorrow, that day after tomorrow you could come back and take up your cubbing, didn't you?

A. No.

Q. How is that?

A. No sir.

Q. You didn't understand that you had to cub every day, one right after another, did you?

A. Yes sir, to learn the yards so you could go on the board.

Q. In other words, you were told and you understood that you had to cub until you learned the yards?

A. Yes sir.

Q. But if you had cubbed one day and had gotten sick or something, you expected that you would be permitted to cub, if you came back the next day or the third day, didn't you?

A. Yes sir.

By the Court:

Q. In other words, when you were required to come one day after another, consecutively, you did or could you come one day and stay out one day and come another day?

A. They didn't make any specific statement to that effect.

Q. In other words, you reported for duty whenever you chose, on whatever day—

A. I reported for duty every day the first nine days.

Q. You actually came every day?

A. Yes sir.

Q. And you were required to come every day?

A. Well, I presume so.

Q. In other words, you stayed on the job?

A. Yes sir.

By Mr. Whitwell:

Q. You were not told you had to come every day but you did come every day because you were anxious to learn the work just as quickly as you could, that is the truth?

A. I reported to the yardmaster every day.

Q. And every time you would report he would suggest to you that you cub with a certain crew that day?

A. That is right.

By Mr. Jansen:

Q. As a matter of fact, weren't you told when you finished your cubbing on certain days that you would have to report to a certain crew the next day?

A. Yes sir, one time. I went to the first yard and worked that.

Q. And you were working during the day and when you got through that day they told you the next day to report to the—

A. To the first yard.

Q. And you know about, Mr. Chambers, don't you, if you had missed a day you would still have to fill in and cover each one of the runs?

A. Yes sir.

Q. How about eight hours? Do you think the foreman would sign your slip if you came and worked there two hours?

A. No sir.

Q. You think he would not?

A. No, he would not.

Q. He would expect you to be there eight hours, wouldn't he?

A. Yes sir.

By Mr. Whitwell:

Q. Mr. Chambers, with reference to that, did you ever cub with a shift for four hours and be excused for the balance of four hours after that?

A. No sir. I stayed on the shift eight hours when I went on.

Q. If you had cubbed four hours and wanted to leave the shift at the end of four hours you don't know what they might have said if you had asked them?

A. That is right.

Q. Or decided to leave of your own accord?

A. That is right.

Q. You just never tried that?

A. No sir.

Q. And talking about them telling you one afternoon to report to another position in the yards, I believe you said, the next day, that was no different to the experience you had every day in your cubbing? In other words, you would go down there every morning and report and say: "I am ready to cub today" and somebody would suggest to you which part of the yard it would be desirable for you to cub that day so that you could learn that part of the yard?

A. That is right. This was different locations downtown.

Q. That is right, and it was thought by the Company that you ought to do some cubbing over there and learn that?

A. That is right.

By Mr. Jansen:

Q. And they expected you to cover each one of those locations, every one of those locations?

A. Yes sir.

Q. And assigned you to the shifts—who assigned you to the shifts?

A. Mr. Whitten, the general yardmaster.

Q. Mr. Whitten asigned you to the shifts?

A. Yes sir.

Q. Did he explain, before you started, that you would have to cover all those shifts, those different jobs?

A. Yes sir.

Q. And did he explain that they worked eight hours a day?

A. Yes sir.

Further this witness saith not.

The Court: What is the general character of the testimony of the next witnes you propose to call?

Mr. Jansen: The next witness is a fireman, may it please the Court. We are not calling any more switchmen witnesses. We have some more but we are going to excuse them. We feel that their testimony would be merely cumulative.

The Court: That is what I had in mind. Is a fireman any different, in principle, from switchmen and brakemen? Don't they all operate just alike in the respects with which we are concerned?

Mr. Jansen: No, your Honor, they do not. I might say that what we propose to do is to call witnesses to describe in detail what firemen do and what brakemen do but not to add to it any cumulative evidence except as their testimony may differ, one from the other, as to the type of work that they do.

The Court: Why don't you call one characteristic witness for each of these that you want to show and then let it go at that? Unless you think there is some reason why you think you ought to have more than that.

Mr. Jansen: I do, your Honor. I think there are certain things about certain witnesses that the Court should be informed on and I see no objection to putting one fireman witness on, for example, and have him describe in general what type of work he does.

The Court: Let's have one for each type of job.

Mr. Jansen: And then as each particular witness is called cover only those things that may differ?

The Court: That is right.

The next witness, HARRY JORDAN ADAMS, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your name is Harry Jordan Adams?
A. Yes sir.
Q. How old are you?
A. Thirty five.
Q. Where do you live?
A. Nashville.
Q. How are you now employed?
A. The NC&StL Railway.
Q. In what capacity?
A. Fireman.
Q. How long have you been working as a fireman for the NC&StL Railway?
A. Since June 7th, 1942.
Q. Do you work at Nashville?
A. Yes sir.
Q. Now, before you went on as a fireman were you required to put in some time cubbing?
A. Yes sir.
Q. What kind of work did you do before you went with the NC&StL Railway?
A. Nashville Linen Service.
Q. What kind of work was that?
A. It is a laundry.
Q. Had you had any previous experience as a fireman?
A. No sir.

Q. Now, do you recall how many days you put in cubbing as a fireman?

A. I lacked one day of being seven weeks.

Q. Cubbing?

A. Yes sir.

Q. How many days a week?

A. I don't really know, to be accurate. I didn't think there was any reason to keep record of it.

Q. Approximately?

A. Well, five days a week.

Q. Lacking one day being seven weeks? Is that right?

A. Yes sir.

Q. That would be thirty four days?

A. Yes sir.

Q. How many hours a day?

A. Well, there is no certain hours limit to it. You just finish the run, whatever you are on.

Q. Let's start at the beginning now. Do you recall filing an application with the Railroad?

A. Yes sir.

Q. And taking a physical examination?

A. Yes sir.

Q. And then going down and being assigned to certain work?

A. Yes sir.

Q. Who did you have your talks with and who did you make your application to and so on?

A. I filed my application with Mr. Johnson, the master mechanic at the shops.

Q. Who gave you your assignment?

A. Mr. Burns.

Q. What is his job?

A. He is engine dispatcher.

Q. In what form did he give you your assignment?

A. He just gave me a slip of paper with the runs that I was supposed to go on.

Mr. Jansen: Do you have the record of this employee, Counsel?

Mr. Hunt: I don't know. Mr. Armstrong here has those records. He brought all the records he could find.

Mr. Jansen: Well, we will get to that. It is all right for the time being but we will get to it.

Q. What was on this slip of paper?

A. Well, we had a certain list, just a list of runs, so many trips in local service, local freight, so many trips in fast freight, so many trips on passenger, and hostler a couple of days.

Q. Which did you do first?

A. I went with the hostler for two days.

Q. When did you start, what time of the day?

A. I think that was the first shift, 6:30 in the morning.

Q. How long did you work?

A. Until 2:30, I think it was.

Q. On each day did you start at 6:30 and work until 2:30?

A. The best of my memory, I think so.

Q. What did you have to do then when you were cubbing on this hostler job?

A. Well, their job is to take these engines when they come in off the road and take them to the shop and get engines coming out of the shop, going out on the road, and bring them back. If it is a freight engine, they take them to the Cedar Street washhouse and if it is a passenger engine, they take it to the Union Station.

Q. Is there anything you have to furnish to the engine when you take it out or bring it out?

A. Well, you take your sand and your water and your coal. Of course, there is no work involved in taking coal, very little work involved in any of it because you just drive under the chute and drop it all down in there.

Q. Did you do that, whatever work was involved while you were cubbing as hostler?

A. You get a little piece of all of it to get your hand in.

Q. Did you have to do any firing as a hostler?

A. Very little. You just—the biggest thing is to get your fire in pretty good shape for the man you are going to turn the engine over to. Of course, if you are pulling a string of engines you have got to have a little steam to get them to the Cedar Street washhouse, not much, because it is down hill most of the way.

Q. And this engine that does pull a string of engines, is that hand-fired?

A. Not always. They generally have a stoker if it is possible to arrange it that way.

Q. Did you do the same work as fireman while you were cubbing as you did elsewhere on the hostler job?

A. Oh yes.

Q. Now, can you remember what you next were required to do?

A. Well, I went out on local for the next two days.

Q. Local?

A. Local from—between Nashville and Cowan.

Q. Do they have different locals on the road?

A. Oh yes, they do, four locals, I believe.

Q. You mean four different runs?

A. Well, they have a local between Chattanooga and Cowan and one between Nashville and Cowan, one between Bruceton and Nashville and one between Hickman and Bruceton.

Mr. Jansen: If it please the Court, I wonder if it wouldn't be helpful to the Court to have just a small map of the system? Do you have any objection, Counsel?

Mr. Whitwell: No sir, I have none whatever.

Mr. Jansen: I guess that is one of your maps (offering map to the Court). This is a drawing taken from the regular time table.

The Court: Any objection to it?

Mr. Whitwell: No sir. He just wanted you to see it.

The Court: I think I know all about it. I have been up and down the road for fifteen years.

(Map marked as Plaintiff's Exhibit No. 2.)

By Mr. Jansen:

Q. Now, I am not as familiar with the system as the Court and counsel for defendant. You say they have one local running between Nashville and Bruceton?

A. Yes sir.

Q. Another local between Bruceton and Hickman?
A. Yes sir.
Q. That is on the west end of the line?
A. Yes sir.
Q. And then a local running between Nashville and Cowan?
A. Yes sir.
Q. And then a local running between Cowan and Chattanooga?
A. Yes sir.
Q. That is on the east end of the line?
A. Yes sir.
Q. And did this slip that you had that had been given you by the master mechanic, did it have reference to these different runs that you were required to make?
A. The master mechanic didn't make that.
Q. Who gave it to you, Mr. Burns, was it?
A. Yes sir.
Q. Did it have those different runs on it?
A. Yes sir.
Q. And the first one you took after you finished cubbing as hostler helper, which run was that? Do you remember?
A. That was the Cowan local.
Q. What time did you start in the morning?
A. I think it was at 6:30.
Q. And what time did you get to Cowan?
A. Well, it was pretty late, about 9:00 o'clock, something like that.
Q. 9:00 o'clock at night?
A. Yes sir.
Q. And then where did you go from Cowan?
A. We stayed there that night.
Q. Stayed there all night?
A. Laid over at Cowan and come back the next day.
Q. What time would you start the next morning?
A. Approximately the same time, 6:30.
Q. What time would you get back to Nashville?
A. Well, that is pretty slow work, that run; get back about 8:00 or 9:00 o'clock.
Q. Around fourteen or fifteen or sixteen hours a day?
A. Not always; sometimes.

Q. I mean if you started at 6:30 or 6:00 and got through around 8:30, that would be fourteen hours a day, wouldn't it?

A. Yes sir.

Q. Now, was that a hand-fired engine or stoker?

A. Stoker.

Q. What did you have to do on that while you were cubbing?

A. Well, I didn't do much of anything except try to learn the job. Of course, the regular firemen, they have the responsibility and they don't like to turn it over to a green man. They are helpful and they help you all they can but it is just like a blind man. You can't do much, you know. They are very helpful and they help you all they can but they don't like to give you too much rope, you know.

Q. Now, that was the first day. How did you do the second day? Did you do any more than that?

A. Well, it is practically the same the second day. Of course, they let you get on to it gradually, give you a little more line all the time and you gradually catch on.

Q. After you finished the Cowan local do you remember what run you went on then?

A. Yes, I went on a freight between Nashville and Chattanooga.

Q. What was that, a through freight?

A. Yes sir.

Q. Between Nashville and Chattanooga?

A. Yes sir.

Q. You started from Nashville, did you?

A. Yes sir.

Q. What time did you start in the morning?

A. I just don't remember.

Q. Approximately?

A. Well, it could have been that night; it could have been 1:00 or 2:00 o'clock in the morning; it could have been any time.

Q. How long did that through freight take to get to Chattanooga?

A. The running time is approximately six hours, six or seven or eight hours.

Q. Then did you stay at Chattanooga for a while?

A. Over night.

Q. And came back on what?

A. Come back on the same thing unless you happen to get called for a section of a passenger train but ordinarily you get the same thing back.

Q. Well, did they call you like they did the other employees?

A. Well, yes, they called me. I told them where I was going to stay.

Q. For instance, on the local run, when you got to Cowan you stayed over night at the hotel, did you?

A. Yes sir.

Q. Some place like that, and you left word at the office where you were going to stay?

A. Told the other fireman and he called me.

Q. Then he called you before the train pulled out?

A. Yes sir.

Q. Now, Mr. Adams, as you went along did you do more work, as time went on?

A. Well, I was perfectly willing and able. I did all they would allow me to do.

Q. Did you ever get on any hand-fired engines?

A. Well, not for sometime. In fact, I don't think I ever did get on any on the Chattanooga road. I finally got on one or two down the Windy between Nashville and Bruceton.

Q. Was that while you were still cubbing?

A. Yes sir.

Q. How long after you had first started cubbing was that, could you remember, approximately?

A. Before I got this hand-fired engine?

Q. Yes sir.

A. Well, that was on the night run. I think I was pretty well finished up on my cubbing then.

Q. What did you do on the hand-fired engine?

A. Well, I shoveled coal and fired it just like the regular fireman.

Q. How much of the time did you fire and how much did the regular fireman fire?

A. Well, that was the only trip I ever made with that

fireman and he was willing to let me do some work. To tell the truth, he was pretty free about it. I helped all I could because he got sick on the job. I will never forget it. He got kinder sick and I helped out all I could. In fact, I wanted to help more. I just didn't know what it was about.

Q. Did you do most of the firing on that trip?

A. No, I tried all he would let me.

Q. Well, how much was that?

A. I just wouldn't know, to be accurate about it; maybe work fifteen or twenty minutes and then maybe he would work that long.

Q. Now, during the time that you were cubbing did you ever get on a run and get paid for it?

A. Oh, no.

Q. And you say you put in thirty-four days cubbing. Did you get any pay for any of that?

A. No sir.

Q. Did you go to work when the run started and stay with them until it finished every day?

A. Yes sir.

Q. Now, were those runs all set out on this schedule that was given to you by the Railroad?

A. Yes.

Q. Did you follow each run as it was given?

A. Yes sir.

Q. Did you miss any of them?

A. Not a one.

Q. Would you say that you worked an average of over eight hours a day each day during that thirty-four day period?

A. I just couldn't possibly say. I don't know for sure.

Q. Now, on a stoker engine, what work do you have to do on those?

A. Well, there is not much in the manner of manual labor at all. It is all a trick of knowing what to do and when to do it to keep your fire right and keep the right amount of water and know where you are and just study the road all the time.

Q. How long did you say it was before you caught on to how to run a stoker engine?

A. Well, to tell the truth, I was a little bit green when I got through cubbing. It is very complicated sometimes. There are so many little complicated things that can come up.

Q. Do you know how to run one now?

A. Oh, yes sir. There are so many little things that come up that you have to know what to do. You can't just take and tell a man how to fire one. He has got to get on it and get the feel of it.

Q. He has got to actually do the firing?

A. Yes sir.

Q. And that is what you did during this cubbing period?

A. Yes sir.

Q. So as to get the feel of it?

A. Yes sir.

Q. And then you are also required to know the layout of the road?

A. Yes sir.

Q. The hills and things like that?

A. Yes sir.

Q. Why would you have to know where there was a hill?

A. Well, it is like driving an automobile. You have got to get up steam to get over it.

Q. Is there any difference in the work you did after you were firing and what you did when you were cubbing?

A. No.

Q. The same kind of work?

A. The same.

Q. The hours the same?

A. Yes sir.

Cross Examination,

By Mr. Whitwell:

Q. Mr. Adams, I believe you say you live in Nashville?

A. Yes sir.

Q. And you began work for the Railroad Company in June, 1943?

A. 1942.

Q. Now, before you went to work for the Company you filed a written application that has been referred to here?

A. Yes sir.

Q. And took a physical examination?

A. Yes sir.

Q. Now, when you filed your written application out at the master mechanic's office you were told then that you would have to cub for a period to learn the road and learn your duties, the duties of a regular fireman in reference to an engine and how to fire engines and those different things, weren't you?

A. Yes sir.

Q. Learn the signals and various things?

A. Yes sir.

Q. You were told, of course, then as I understand it, that you would not be paid during the period of your cubbing and you understood that, didn't you?

A. I understod it after I came on the road, yes sir.

Q. In other words, you understood that back in 1942 the Company was not paying persons?

A. Yes sir.

Q. For the time that they would spend in cubbing and learning the duties of the job that they applied for?

A. I knew that.

Q. You say you were a little green when you first started to work as a regular employee?

A. Well, yes sir.

Q. In other words, you don't think you cubbed too long, do you?

A. No, I don't think so.

Q. Now, Mr. Adams, when you were going through this cubbing period for your own benefit to learn the duties of a job that you had applied for and which you hoped to get later on—didn't you?

A. Yes sir.

Q. Does a person while cubbing and actually performing the manual activities of operating a stoker or hand-fired engine, does he actually waste coal while he is learning?

A. I suppose he will, to a certain extent.

Q. Now, you were handed some sort of a slip, I believe

you said, by Mr. Burns, engine dispatcher, that had on it the schedules up and down the line, some of them local trains, some fast freights, some passenger maybe, that is right, isn't it?

A. That is right.

Q. And just above that schedule do you recall there was written: "It is desired that you cub the following schedules"? Is that the language used?

A. I think so.

Q. Now, the reason you cubbed the schedule exactly as it was handed to you was because it was convenient for you to do that and you were anxious to learn the road and learn the different duties of a regular fireman just as quickly as you could? That is true, isn't it?

A. That is right.

Q. And you cubbed those different schedules right down the line only because you wanted to do that to learn just as quickly as possible. That is it, isn't it?

A. Yes sir.

Q. Now, just a very few questions along this line, and I want to ask you, since some mention was made of thirty-four days cubbing, do you know the mileage from Nashville to Chattanooga, the road mileage?

A. 151 miles.

Q. Do you know the road mileage from Nashville to Hickman, Kentucky?

A. 172.

Q. Then you had to learn on all that mileage of the road the roadbed, location of the stations, sidetracks, switch tracks and things like that all up and down the line, didn't you?

A. That is right.

Q. And on part of that mileage, especially between Nashville and Chattanooga, there is one or more what we call branch lines coming into the main line, on which you were cubbing, aren't there?

A. Yes sir.

Q. And there had to be switches at those different intersections as well as side tracks at various places along the line, wasn't there?

A. That is right.

Q. And you had to learn the different fixed signals there were along the line, block signals, centralized traffic control indications and things like that, didn't you?

A. Yes sir.

Q. And the fireman was there at all times, wasn't he, Mr. Adams, and giving you instructions about how to fire on approaching a grade, teaching you the different switching operations, in the case of a local train at the various stations along the line? Is that true?

A. He was always with me.

Q. And you had to learn the stations on the line between Chattanooga and Hickman, didn't you?

A. Yes sir.

Q. And the fireman, in addition to telling you things about the locomotive, about signals, switching and those things, he showed you from time to time and let you watch him do different things, didn't he?

A. Yes sir.

Q. For example, he would show you how to operate a stoker-fired engine and explain that to you and then later on he would let you do some of that, didn't he?

A. That is right.

Q. And so you learned not only by what he said to you but by watching him and also by actually performing the manual activities that the regular fireman would have to perform had you not been there, that is it, isn't it?

A. That is right.

Q. And I believe you say, if you have any complaint at all to make, it is that some of them wouldn't let you do enough of that because you felt like if they would let you do more you would have learned sooner, is that not true?

A. That is right.

Q. And whatever you did by way of firing the engine or any other work that you may have performed while you were cubbing, that work, whatever done, was the work that the regular fireman was there to do and paid to do, wasn't it?

A. That is right.

Q. And you had no duty nor any responsibility for the

operation of any train that you cubbed on while you were cubbing, did you?

A. No.

Q. That duty and that responsibility rested with the members of the regular crew, didn't it?

A. That is right.

Q. And you cubbed with a full crew during the time that you cubbed, didn't you?

A. Oh yes.

Q. In addition to learning the road from Nashville to Cowan, Cowan to Chattanooga, Nashville to Bruceton and Bruceton to Hickman, you say you cubbed a while as hostler at the shops?

A. Hostler helper.

Q. And that was to learn the duties of a regular fireman, wasn't it?

A. Oh yes.

Q. And so everything you did, Mr. Adams, while you were cubbing was for your benefit, wasn't it, to learn as quick and as well as you could learn it?

A. That is right.

Q. You knew you had to go through this cubbing experience before there was any possibility of you getting on the extra board or roster of employees, didn't you?

A. Oh yes.

Q. And when you applied you were given a questionnaire with four or five hundred questions in it?

The Court: Is this one going to be any different from the others?

Mr. Whitwell: No.

The Court: Let's don't have any more of that, then.

Mr. Whitwell: All right. I wanted to ask this:

Q. If I understood you correctly, you said that when you would make a run, Mr. Adams, I mean go with a regular crew on a run, say from Nashville to Chattanooga, you would stay there somewhere along with the regular crew and when they would come out the next day some member of that crew would call you and let you know when they would go out. That is what you mean by that?

A. That is right.

Q. The regular train caller doesn't call cubs like he calls the members of the regular crew, does he?

A. No. He would if the cub would call him and tell him where he was going to stay.

Q. If you tell him and ask him to call you, he would; otherwise, he wouldn't?

A. That is right.

Q. But he is required to call every member of the regular crew, isn't he?

A. Yes sir.

Q. Who is first out?

A. Yes sir.

By Mr. Jansen:

Q. One question I forgot to ask you. Did you take an examination before you went on the extra board?

A. Physical?

Q. No, no, on the rules?

A. Yes.

Q. Between the time you cubbed and the time you went on the extra board?

A. Yes.

Further this witness saith not.

The Court: After lunch let's take up a different type of witnesses. I don't want to interfere with the manner in which you present your case but I just want to point out the lack of necessity for cumulative testimony. Let's just get characteristic witnesses that illustrate the situation.

Recess until 2:00 o'clock.

Thereupon a recess was taken for lunch until 2:00 o'clock.

Afternoon Session.

The next witness, J. W. ARNOLD, being first duly sworn, testified as follows:

Direct Examination

By Mr. Jansen:

Q. Your full name is what?
A. James Woodard Arnold.
Q. How old are you?
A. Forty-one years of age.
Q. Where do you live?
A. 1200 Stainback, Nashville, Tennessee.
Q. How are you now employed?
A. L&N Railroad.
Q. Have you ever been employed with the NC&StL Railway?
A. Yes sir.
Q. When were you employed with the NC&StL Railway?
A. June, 1943.
Q. What kind of work were you doing before you were with the NC&StL Railway?
A. Railway Express Company.
Q. How many years had you been with them?
A. Three.
Q. Had you learned a little bit about railroading while you were with the Railway Express?
A. Well, in a way, yes sir, by working downstairs unloading cars, railroad cars, express cars and baggage cars.
Q. So railroading was a little bit familiar to you anyway?
A. Yes sir.
Q. When you first went with the NC&StL Railway were you required to spend some time cubbing?
A. Yes sir.
Q. Do you remember for how long, how many days you spent cubbing?
A. About twenty-two, I believe.
Q. Did you ever get paid for any of those days?
A. No.
Q. Do you remember when you started cubbing?
A. June 2nd, I believe.

By the Court:

Q. What year?

A. 1943.

By Mr. Jansen:

Q. Now, Mr. Arnold, the defendant company has produced your record with the company, the NC&StL Railway, and I will ask you, first, to just tell us who you talked with about a job with the NC&StL Railway.

A. I talked with Mr. Shanon.

Q. Who is Mr. Shannon?

A. He is the trainmaster's clerk.

Q. And in talking to Mr. Shannon did you have to file some application form or something like that?

A. Yes sir.

Q. Did you take a physical examination?

A. Yes sir.

Q. Did you have to pay for that?

A. Yes sir.

Q. How much?

A. $2.00.

Q. Did the Company reimburse you for that?

A. No.

Q. After your physical examination did you go back to see Mr. Shanon?

A. Yes sir.

Q. Did he provide you with something to indicate how you should do your cubbing?

A. He gave me a list of my cubbing.

Q. Now, calling your attention to your record, I wish to show you something that is dated June 6, 1943. Do you recognize that?

A. Yes sir.

Q. And what is that?

A. That is the cubbing list that you go through.

Q. Was this given to you by Mr. Shannon before you started your cubbing?

A. He didn't give me this but he gave me another list and I did see this list.

Q. You saw this list and the list you see here, that I

have just called your attention to, did that have the same list of trains and times on it?

A. Yes sir.

Q. Now, did he give you anything else at that time?

A. He gave me a pass and the switch key, cubbing list and a light.

Q. And a cubbing list and a light?

A. Yes sir. Of course, I bought the light.

Q. Now, I call your attention to this other document dated June 6, 1943, which has conductors on passenger and freight trains. I will ask you what that is?

A. That is a cubbing list.

Q. Is that what was given to you at the time by Mr. Shannon?

A. Yes sir.

Q. And all of these dates and signatures that are on this, what are those?

A. This is the date and that is the train and that is the conductor of the train.

Q. And when did those dates and the trains and conductors' names go on there?

A. The days that I worked on them cubbing.

Q. Before you started or when you finished?

A. At the end of the trip.

Q. Now, I call your attention to this form, which has in its corner, upper right-hand corner "Form 284 revised 7/19/29", is that the application blank you filled out?

A. Yes sir.

Q. Did you fill out anything else at that time that you remember?

A. I filled out another form relieving the Railroad of any responsibility while I was cubbing in any way, in case of an accident, I believe.

Q. Will you look in this record and see if you can find it?

(Witness looks through file.)

Q. Is this it that you have come to in it, a release dated June 6, 1943?

A. Yes sir.

Q. You also signed that at the time you filled out your application?

A. Yes sir.

Q. You have had a chance to run through this record. Is all of this your record with the NC&StL Railway?

A. Yes sir.

The Court: Let me see that agreement that he said he signed there about that release.

(Handing paper to the Court.)

By Mr. Jansen:

Q. Now Mr. Arnold, that list of trains or assignments with which you are to cub doesn't indicate the hour that they start. Will you find out about that? How do you find that out?

A. Well, by consulting the timetable is one way, leaving out of Nashville. The caller always called me for that crew. I told him I was going to be on that crew, what day I was going to be on it and he would call me for that day.

Q. You mean the caller would call you every day you were to go out while you were cubbing?

A. Yes sir.

Q. How about on the other end?

A. When we got to destination there the conductor, I would register on the back there; he would put my name down as a cub and the caller would call me with the rest of the crew.

Q. And the conductor would put your name down, would he?

A. Yes sir.

Q. Now, the first day that you cubbed, can you remember the train that you were on?

A. It was on the Bruceton local.

Q. Well, will you tell us in a general way what you did that first day.

A. Well, the first two or three hours of it I was totally blank because I had never been on a train working and I didn't know what to do except wa ch the other fellow but after several hours of it then, why, they would turn me loose to cut off cars, throw switches and things like that.

Q. And when you say they would turn you loose, what do you mean by that?

A. Well, they would tell me to cut off three cars back or four cars back in the train and I would go on and cut them off. He would sign the engineer to slow up to make a coupling and I would make the coupling, back the train in and make the coupling.

Q. Was there anybody there with you when you were making the coupling or cutting them off?

A. He would be placed at another place in the train maybe one car or two or three car lengths from me.

Q. He wouldn't be right with you?

A. No.

Q. That was the first day?

A. The first day, after several hours on that crew.

Q. What other kind of work did you have to do on this local the first day?

A. Well now, of course, they had a lot of freight to unload at these stations with a two wheel truck and I did my part of that.

Q. What do you mean—freight to unload? Did you have less than carload lots?

A. They have what they call a local car and that has from one to a hundred pieces for certain stations along the road and it has got to be unloaded there and so much freight loaded there and on farther down the road and, of course, the local crew has to do that, the brakemen.

Q. Well, did you do any of that unloading?

A. Yes sir.

Q. How long did it take you to learn to run one of these two-wheel trucks?

A. I had a three-year post-graduate course at that at the Express Company. I didn't need any instructions to do that.

Q. Now, did you help unload at stations?

A. At every station.

Q. And how about loading?

A. Well, I helped load it.

Q. Was anything ever said to you about loading and unloading freight?

A. At one station, yes sir.

Q. What was that?

A. I threw the switch, the main line switch to let the

engine and house car back into the house track and the engine came back so fast I couldn't get on it, so I stood at the switch and the conductor, he made the remark to the head brakeman: "If that cub don't get down here and help do this work I won't sign his papers when he gets to Bruceton."

Q. What kind of work did he want you to help do?

A. Unload one piece of freight.

Q. And the conductor was in charge of the train, was he?

A. Yes sir.

By the Court:

Q. Did the regular brakemen customarily perform that kind of work, loading and unloading?

A. Two brakemen.

Q. Brakemen did that ordinarily?

A. Yes sir.

By Mr. Jansen:

Q. How many of them were doing it when you were cubbing?

A. All of them.

Q. Does it slow down the work for all three of you to load and unload freight?

A. I would think it would help out.

Q. How long did you work on this local—do you remember, the one from Nashville to Bruceton?

A. The first day was about fifteen hours.

Q. What time did you start in the morning?

A. 6:00 or 6:30.

Q. Did you work all along with the crew, all day long?

A. Yes sir.

Q. Did they tell you at the end of eight hours you could sit down at some place or anything like that?

A. No sir.

By the Court:

Q. Now, was that the length of time that you customarily worked, that many hours, as a cub a day or was that just an exceptional day?

A. Well, it averages that much on most all locals.

Q. On most all what?

A. Local trains.

Q. Well, how many days did you work on a local while you were cubbing?

A. That was what we call a four-day local. It makes a trip, off a day and makes another trip. Works four days a week, so I made two trips with the same crew between—I went to Bruceton one day, to Nashville the next and laid over a day and then made another trip.

By Mr. Jansen:

Q. Can you, by referring to this record, tell me how many days you spent on locals? Count them out for us. Of the 22 days?

(Witness counting from the record.)

A. Seventeen.

Q. Seventeen out of twenty-two days were spent on locals?

A. Yes sir.

Q. And they were not always the same local?

A. No sir.

By the Court:

Q. Well, would you work fifteen hours a day on all of those trains?

A. They were twelve-hour trains. They were guaranteed twelve hours and they always made overtime.

Q. Sometimes they would run late?

A. Yes sir.

Q. Well, the regular crew got overtime and you just—

A. Experience.

Q. You were not compensated for that time?

A. No sir.

By Mr. Jansen:

Q. You say they were guaranteed 12 hours. What do you mean?

A. It was what you call a guaranteed run, guaranteed 150 miles a day, eight hours or 150 miles to make twelve hours.

Q. Do I understand that in most cases it took over the twelve hours?

A. In most cases it took over twelve hours. A lot of times the Hours of Service Law would catch them on the road.

Q. What do you mean by that?

A. Sixteen hours. They can't work after fifteen hours and fifty-nine minutes.

Q. Were you ever caught by the Sixteen Hour Law when you were cubbing?

A. No.

Q. You were afterwards?

A. Yes sir.

Q. Now on each of these locals, these seventeen days out of twenty-two days, did you handle freight in and out of box cars?

A. Every day.

Q. And did you do the other work that a brakeman on a train does?

A. Yes sir.

Q. Did you have someone with you right by your side all the time you were working?

A. No.

Q. Explain that to us.

A. Well, I was just what you might say, another man in the crew and if there was a move to be made they would send me back to do it or send me ahead to throw switches. Of course, I didn't know where cars was spotted along the road and one of the older men would have to do that but whenever he stopped the engine I would cut them off or maybe drop them in a side track.

Q. You did that on all of these local runs?

A. Yes.

Q. You say you were sort of an extra man on the crew?

A. Yes sir.

Q. While you were doing what you were doing the other men were doing something else?

A. Yes sir.

Q. Now, besides the local, can you tell us what other kind of work you did while you were cubbing?

A. Three days in Bruceton on a switch engine.

Q. Let's talk about that for a minute. Do you remember which days they were, how long after you started?

A. I was mistaken. Here is the switch engine here (referring to a record), this 954. Three days right here. You see, I was confused. You see, that is the south end local here—"S.E." here, which is "Switch Engine", the same thing.

Q. So you spent three days in the Bruceton yards?

A. Yes sir.

Q. Now, tell us about that. You had been cubbing for a while on the locals?

A. A few days, yes sir.

Q. How did you get to Bruceton?

A. I worked baggage to Bruceton on a passenger train.

Q. You mean you had to work to get to Bruceton?

A. Yes sir.

Q. What did you do on the baggage car?

A. Well, of course, we all know that is pretty light down there. They don't have a whole lot of baggage, just a few pieces, and, of course, you have to put it off when you come to a station where it goes, and pick it up, if they have got anything there. And then have to write up all this stuff, keep record of it.

Q. Did you do all of that while you were cubbing?

A. I didn't the record part of it, no, the writing.

Q. What part did you do?

A. I helped load and unload baggage at stations.

Q. Was there another man on the baggage car?

A. The regular baggageman, yes sir.

By the Court:

Q. What did he do?

A. He would say: "Put this off at Kingston Springs; put this suitcase off at Burns" and, of course, it would be sitting right there in the door and you set it right off.

By Mr. Jansen:

Q. Was there anything about that baggage work in this schedule here that they gave you?

A. I don't see it.

Q. How did you happen to go on the baggage to Bruce-

ton before you went on the switch engine in the Bruceton yards?

A. It shows in some of these lists there somewhere. He probably might have just told me not to finish the run or to work baggage back. I don't remember exactly how that was.

Q. But you know you did work baggage?

A. Yes sir.

Q. You know you were told to do it?

A. Yes sir.

Q. Whether it is on your list or not?

A. Yes sir.

Q. Who told you to do that?

A. Mr. Shannon.

Q. Did you work baggage more than once while you were cubbing?

A. About three times, the best I can remember.

Q. Was that in between places?

A. In between stations, yes sir.

Q. You never did get a free ride then?

A. Not exactly; always in the baggage car.

Q. Always in the baggage car, and you worked in the baggage car and did this work you have described?

A. Yes sir.

By the Court:

Q. Was that baggage car work part of the duties of the regular brakeman that you were understudying?

A. Yes sir, under the baggageman. Every car has a baggagemaster. You see, when I was turned loose on the board I was subject to catch his place in case he laid off.

Q. You were cubbing for that kind of a job?

A. Yes sir.

Q. And that was work done by the regular man on that job?

A. Yes sir.

Q. You just did it in his place?

A. Yes sir.

By Mr. Jansen:

Q. That was part of the work you might be called to do from the extra board?

A. Yes sir.

Q. In other words, each one of the four different runs on the railroad, including the switch engine at Bruceton and the switch engine at Cowan, was part of the work you might be called to do when you are on the extra board?

A. That is right.

Q. Is that the reason why they had you do all those various things?

A. Yes sir.

Q. Now, tell us about cubbing in the yards at Bruceton. What did you do there?

A. Well, the switch engine makes up and breaks up trains there. They make up out-going trains and break up in-coming trains. Of course, it has a foreman and two switchmen. Of course, I just got out there with them and helped them do the work.

Q. How did you do that? Will you tell us what part you did?

A. Mr. Thornton put me on the end that cut the cars off and he would give me a signal, how many to cut off, and I would cut them off and this other man down here would line the track up for them to go into.

Q. Was anybody else working right where you were?

A. No sir.

Q. You were doing that all alone?

A. Yes sir.

Q. The very first day you were in the Bruceton yards?

A. Yes sir, the first day.

Q. Where was the other man?

A. He was there in some other part of the yard splitting up a train and getting them ready to be worked.

By the Court:

Q. Would it be other work in the yard that he would eventually have to do anyway?

A. Yes sir.

Q. While you were cutting off those cars?

A. Yes sir.

By Mr. Jansen:

Q. Now, in the switching of the Cowan yard did you do the same thing?

A. Yes sir.

Q. Each day that you were switching in the Bruceton and Cowan yards how many hours did you work?

A. Eight hours.

Q. Did anybody ever tell you that you could come later or go home early?

A. No.

Q. Did anybody ever say anything to you about what run you should take or whether you could lay off?

A. They told me to follow that list that they gave me.

Q. Who told you that?

A. Mr. Shannon.

Q. Did you ever speak to Mr. Shannon about laying off?

A. Well, I had been to Nashville on the off-day one day and was going out on the local and I asked him if in case the Hours of Service was going to get us could I get off of this local and catch this passenger train home and he said: "Stay on that crew."

Q. Was there more than one shift in the Bruceton yard?

A. They work twenty-four hours a day.

Q. Did you work the different shifts there?

A. No, I worked the same shift.

Q. Each day you worked?

A. Yes sir.

Q. While you were cubbing?

A. Yes sir.

Q. Did you ever receive any pay for that cubbing on the NC&StL Railway?

A. No sir.

Q. Now, besides the local trains and the switching at Bruceton and at Cowan did you do any other type of work while you were cubbing, like pusher, for example?

A. They have a pusher at Cowan.

Q. Did you do that while you were cubbing?

A. Well, that was one day—I cubbed one day at Cowan on the pusher. At Cowan, of course, it worked in the yard and worked as a pusher too.

Q. Oh, it did both, you mean, switching and pushing?

A. Yes sir.

Q. What is that pusher there?

A. That is to assist trains over Cumberland Mountain.

Q. How many men are on the crew of the pusher?

A. One.

Q. Just one of the ground crew?

A. Yes sir.

Q. And when you were cubbing on that how many were there?

A. Two.

Q. What did you have to do on the pusher?

A. Well, when we carried a freight train over we always pushed it over from the rear end. Of course, this brakeman on there, he came down to the station and coupled into the train and shoved it over the hill, and he rode the front end of the engine here and the cub pulls the pin and the train would go on and he would come back down the mountain with his engine.

Q. Did you ever do any of that?

A. Yes sir.

Q. Did you ever do any riding the front of the engine and pulling the pin?

A. Yes sir.

Q. You did that yourself?

A. Yes sir.

Q. While you were cubbing?

A. Yes sir.

Q. Now, is there any difference between the work you did on the local train between Bruceton and Nashville and that between Nashville and Cowan?

A. The same thing.

Q. You did the same kind of work?

A. The same kind of work.

Q. What is the difference in cubbing on one from the other?

A. It is the same.

Q. So when you were working on four of these different runs in your cubbing you were doing the same kind of work on each one of the runs?

A. Yes sir.

Q. Tell me, how long did it take you to catch on to coupling and uncoupling trains, throwing switches and so on?

A. Oh, possibly fifteen or twenty minutes.

Q. Does that include all the actual manual labor that a switchman does?

A. Yes sir.

Q. And it took you about fifteen or twenty minutes?

A. Yes sir.

Q. And the rest of your time spent in cubbing was learning the road?

A. Yes sir.

Q. Location of tracks, switches and those things?

A. Yes sir.

By the Court:

Q. If I understood you now, when you were cubbing in the yard you worked eight hours a day and no more than that?

A. Eight hours. I don't believe that crew made any overtime the three days I was with them.

Q. Now, when you got to cubbing out on the road you were sometimes put on a local train that had a twelve-hour schedule?

A. Yes sir.

Q. And if the train was on time you would work not more than twelve hours on that?

A. Yes.

Q. And sometimes the train was as much as three hours late and you would have to work as much sometimes as fifteen hours?

A. Fifteen—not on every occasion. On a real light day they might get through the run in eight hours but they still get paid for twelve hours regardless of the time it takes to run it.

Q. What would be the rule? Would the local train leave pretty well on time, as a rule, or would it be late every day?

A. Late every day.

Q. How much late?

A. Anywhere from one to three or four hours.

Q. And you said you never did run into the Sixteen Hour Law?

A. Up to fifteen hours several times.

By Mr. Jansen:

Q. Mr. Arnold, will you file this as an exhibit and part of your testimony? (Man's personal record with the Company.)

Mr. Whitwell: Now, if the Court please, the only objection on earth I have to that is that that is our original record. We have no other record. I have no objection in the world to the gentleman making and filing a copy of that record but it is a necessary record that we keep.

The Court: Well, it could go in as evidence subject to your right to withdraw it from the file when final judgment is rendered herein or the plaintiff, who offers it shall make copies and substitute. If you want to put it in under those circumstances you may do so.

Mr. Jansen: Let me suggest the alternative that the defendant make copy. They are more familiar with it and they have the forms.

The Court: Well, if they want to accept that alternative, I won't put it on them.

Mr. Whitwell: Of course, they subpoenaed over three hundred records and if you make similar request of us as to those three hundred records—

Mr. Jansen: Oh no.

Mr. Whitwell: I won't really assume the expense or the responsibility of going to the expense.

The Court: Let it go in evidence with the condition that the Defendant may withdraw it from the file after fifteen days subsequent to final determination here, final judgment here, and if the plaintiff wants copies to remain in the record you can substitute them before that time. Go ahead.

(Papers so filed as Plaintiff's Exhibit No. 3.)

Cross-Examination,

By Mr. Whitwell:

Q. I believe it is—his Honor asked you about that. I understood you did your cubbing sometime about June, 1943?

A. Yes sir.

Q. And you cubbed twenty-two days?

A. Something like that, yes sir.

Q. And that cubbing was on the line of road in East Tennessee and to Hickman, in West Tennessee?

A. Yes sir.

Q. And you cubbed on locals the bigger part of the time?

A. Yes sir.

Q. Now, isn't it a fact, Mr. Arnold, that it was desired that you cub on a local train the major part of the time because by cubbing on a local train you can learn quicker and faster the location of side tracks, switches, yard tracks, house tracks, etc., because the local train actually serves those local stations where these through trains do not? That is true, isn't it?

A. Yes sir.

Q. So you gained your experience and training quicker by having cubbed on these local trains than by cubbing on fast through freight trains, didn't you?

A. Yes sir.

Q. And these schedules that were handed to you, they were so spaced about as to give you experience on the line of road from Bruceton to Hickman, on the line of road from Bruceton to Nashville, on the line of road from Nashville to Cowan and on the line of road from Cowan to Chattanooga, weren't they?

A. Yes sir.

Q. Now, you spoke of spending some time learning the yards at Bruceton. I will ask you whether or not it is true that the regular road crews perform such switching as is done in the yards at Bruceton?

A. No sir.

Q. They do some of the work in the assembling of trains down there, don't they?

A. No sir.

Q. They do have to be familiar with the yards there for the purpose of their operations there, don't they?

A. Yes sir.

Q. And you understood that when you were cubbing it was for the purpose of learning those yards in connection with your road work if you later got a job?

A. No, not quite, Mr. Whit., at Bruceton, not road work.

Q. Now, all that switching was part of it, in connection with the road operations, wasn't it?

A. No sir, that is not connected with the yard work but I was studying to take that job off of this board at Nashville, the reason I done that.

Q. Oh yes. By performing that switching you were subject to obtain a job there in case of a vacancy?

A. On the switch engine, yes sir.

Q. Well, that was true of the regular employees too, wasn't it? That was available to them just the same?

A. Yes sir.

Q. And that is why you did that switching there. You spoke of this pusher engine business up at Cowan. I believe you said the pusher engine was used to help or assist long heavy trains, both freight and passenger, over the mountain?

A. Yes sir.

Q. Now, that work in the operation of the pusher is performed by the regular employees, isn't it?

A. Yes sir.

Q. And such activities as you were engaged in in connection with the pusher operation, it was for your benefit, for you to learn the duties of a brakeman in connection with the pusher operations and activities; wasn't it?

A. Yes sir.

Q. And you didn't do anything in connection with that pusher operation that the members of the regular crew wouldn't have done had you not been there?

A. No sir.

Q. In other words, everything you did by way of learning the duties of a brakeman in reference to that was something that the regular brakeman was there to do and paid to do, wasn't he?

A. Yes sir.

Q. Now, if I understand you correctly, in connection with your cubbing, you did some cubbing in the baggage car to learn the duties of the baggagemaster?

A. Yes sir.

Q. The regular man. Now, in learning that you were shown by him how to do certain things in connection with it, and you also learned by actual performance of those things yourself there with the baggageman, didn't you?

A. Yes sir.

Q. And whatever you did in connection with learning that was something that the regular man was there to do and paid to do, that is true, isn't it?

A. Yes sir.

Q. And you did that for the purpose of learning the duties of that job?

A. Yes sir.

Q. So that if the baggageman were off you would be eligible to catch his job, wouldn't you?

A. Yes sir.

Q. Now, Mr. Arnold, while you were cubbing you had nothing to do, no control over the operation of the train. That was with the train crew, wasn't it?

A. Yes sir.

Q. You had no duty and no responsibility for the operation or in connection with the operation of that train; it was with the regular crew, wasn't it?

A. Yes sir, I didn't have any responsibility but I had a duty.

Q. Well, in other words, you were there trying to learn, weren't you?

A. Yes sir.

Q. Now, in connection with this training, had you had any prior experience as a switchman before you began cubbing with the Railroad?

A. No sir.

Q. Now, the conductor or the regular brakeman there, they would show you and tell you about the locations and about the switches and about the signals and those various things a regular brakeman has to do and perform, wouldn't they?

A. Yes.

Q. And then you would also learn, not only by what they would tell you, but by watching the regular man perform those various duties?

A. And performing them. I learned a lot that way.

Q. I am getting to that. Then you would learn also by the actual performance of those various things?

A. Yes sir.

Q. You were doing that for your own benefit and learning, weren't you, to qualify yourself for this job that you had applied for?

A. Yes sir.

Q. That is the truth, isn't it?

A. Yes.

Q. And whatever you did was something that the regular man was paid to do and he was at hand and let you do it, that is it, isn't it?

A. Yes sir.

Q. Now, when you made your application for the position of a brakeman, you understood then and were told that you would have to go through a cubbing period to learn the duties of a brakeman before you could be employed, weren't you?

A. Yes sir.

Q. You understood and were told then that you wouldn't be paid any compensation or money for the time that you spent learning the duties of the job which you expected later to get?

A. Yes sir.

Q. There was no misunderstanding at all about that?

A. None at all.

Q. And the reason you cubbed was to learn so that you could get a job later?

A. That is right.

Q. And before you went on the regular board of employees, the roster of employees, you took a written examination, didn't you?

A. Yes sir.

Q. You passed the examination?

A. Yes sir.

Q. And all of that was before you got on the board and became an employee?

A. That is right.

Q. After you went through all this routine you then went to work, went on the roster of employees and began drawing the regular contractual rate that was applicable to that job?

A. Yes sir.

Redirect Examination,

By Mr. Jansen:

Q. One question, Mr. Arnold. Mr. Whitwell spoke to you about the benefit—you were the only one who got any benefit from the work you did while you were cubbing?

A. Well, I would think the Railroad benefited by it.

Q. In what respect?

A. Well, that was just helping out over the road, just doing my part of the work just the same as any other man in the crew.

Further this witnes saith not.

The next witness, R. T. JUSTICE, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your full name is what?

A. Roy Templeton Justice.

Q. Where do you live?

A. Nashville.

Q. How old are you?

A. Forty-six next month.

Q. Who are you working for now?

A. The L&N Railroad.

Q. Were you ever employed by the NC&StL Railway?

A. No sir, not no more than cubbing.

Q. You did some cubbing?

A. Yes sir.

Q. Do you remember when that was?

A. That was about the 18th day of June until about the 8th day of July.

By the Court:

Q. What year?

A. 1944.

By Mr. Jansen:

Q. 1944?

A. Yes sir.

Q. Do you remember how many days it was?

A. Yes sir.

Q. How many days?

A. Sixteen days cubbing and one day that Mr. Shannon said he would pay me for taking the examination, made seventeen days.

Q. Did you hear the testimony of Mr. Arnold?

A. Yes sir.

Q. Did you cub the local runs such as he cubbed?

A. No sir.

Q. What did you do different from him?

A. Well, I cubbed one day on local from here to Cowan. I made three round trips to Bruceton, three round trips to Chattanooga and one round trip on baggage.

Q. On the round trips to Chattanooga, was that on through freight?

A. That was slow freight.

Q. That is the same as through freight, is it not?

A. Yes.

Q. Did you hear the testimony of Mr. Arnold with regard to work that was done while he was cubbing?

A. Yes sir.

Q. Did you do a similar kind of work?

A. Yes sir.

Q. Did you get paid for every day that you spent cubbing?

A. No sir, I got a check for $30.00 after I cubbed eight days.

Q. $30.00?

A. Yes.

Q. And you cubbed altogether seventeen days?

A. Sixteen days cubbing and one day for examination which Mr. Shannon filled out a card for and said he would pay me, for taking the examination.

Q. And did you pass the examination?

A. Yes sir.

Q. And after you passed the examination that put you automatically on the extra board, doesn't it?

A. Yes sir, but I didn't go on the extra board.

Q. You didn't go on the extra board?

A. No.

Q. Why was that?

A. Well, Mr. Shannon, when I got this check—well, when I made this first trip to Bruceton and come back, the next trip we dead-headed but I didn't know anything about it until I was in the yard and the conductor came in the caboose and said: "We will dead-head to Bruceton," which we did. Then we made a Martin turn-around while we were down there. Then when we come back I went up to Mr. Shannon and told him and he said: "We will not pay for a dead-head trip and the Martin turn-around." I says: "Well, I will quit right here." He says: "You go on and do your cubbing and finish up, take your examination, and I will pay you," which I did do, and then after I got through my examination I went down and I wasn't even on the payroll. I went back to Mr. Shannon and he says: "No, because you won't go on the extra board I will not pay you." I said: "Who else must I see?" He said: "Nobody. Try to get it." I said: "I will do my best" and he told that I didn't stand the examination but the papers show for themselves, if he has not tore them up.

Q. Had you had any previous railroad experience?

A. Yes sir.

Q. With what road?

A. L&N Railroad.

Q. Before you went with the NC&StL?

A. Yes sir.

Q. How many years?

A. About two years.

Q. What kind of work were you doing on the L&N?

A. Braking.

Q. The same kind of work?

A. Yes sir.

Q. Was there any difference between the work that you did on the L&N and the work you did on the NC&StL?

A. No sir, not any.

Q. And then you went back to the L&N?

A. Yes sir.

Q. And you are working for them now?

A. Yes sir.

Q. Are you braking with them?

A. No, firing.

By the Court:

Q. When you were cubbing for the NC&StL in the yards how many hours a day did you stay on the job?

A. On the NC&StL?

Q. Yes.

A. Well, I don't know just how many hours because I didn't keep up with the hours.

Q. Well, approximately how many, three or eight?

A. I stayed with the crew, I guess six or eight hours from here to Bruceton.

Q. No, I say in the yards.

A. I didn't work in the yards for the L&N.

Q. When you were cubbing on the line of road for the NC&StL about how many hours did you put in?

A. Oh, maybe eight or nine hours, and on the other, about nine hours on the Cowan local that day.

Cross-Examination.

By Mr. Whitwell:

Q. Mr. Justice, if I understood you correctly, most of your cubbing, while you were cubbing on the NC&StL, was on some trains other than local trains?

A. Yes sir.

Q. And that was the through freight trains that you speak of?

A. Yes sir.

Q. These through freight trains between Nashville and Chattanooga, they would make that run in six hours or less, wouldn't they?

A. I couldn't tell you because I didn't keep up with the time on it.

By the Court:

Q. Well, you could give us some estimate. You said you estimated on the local that you were cubbing about nine hours. You can certainly give some estimate of it.

A. Well, I imagine some of them make it in four, five or six hours, something like that, but as far as the schedule, I don't know.

By Mr. Whitwell:

Q. Well, as a matter of fact, they would make this run in six hours or less, wouldn't they?

A. I wouldn't know.

Q. What is your best judgment about that?

A. I wouldn't say what time it takes for I wouldn't know.

Q. You know it was less than eight hours, don't you?

A. Probably was, some of them.

Q. Now, why wouldn't you make us an estimate there?

A. Because I don't know just exactly how long it took them.

Q. Well, you didn't count the hours that it took the local from Cowan to Chattanooga?

A. We left here about 7:00 o'clock in the morning and got to Cowan about 4:00 is the reason I know what time I made on that, but the others, I didn't keep up with them.

Q. Now, Mr. Justice, about this examination, while it is on my mind, you say you took a written examination?

A. I did.

Q. Do you know whether you passed it or not?

A. Yes sir, I do.

Q. Did you get a report?

A. I will tell you the reason why, because every day the man that give us the examination—there was other men there besides me—and if there was anything wrong with it we had to make it right in the morning and he o.k'ed it before we started on the next day.

Q. Did you get a report from your examination?

A. He okayed it if it was all right. Like today, he okayed that in the morning and if there was anything wrong we had to make that right before he would o.k. that part of it.

Q. Did you see and talk to anybody about that?

A. Mr. Shannon. I carried my lantern and keys up there to him and told him I wasn't working any more. Then was to come back on this Monday and start to having review and I didn't get any money and I didn't see any use my reviewing.

Q. And then this form that is written on the top seemed to indicate you were paid for one day for a physical examination.

A. Well, they have got—what is this first entry, June, 1944?

Q. That was included in this eight days.

A. And then the next entry is June 4th.

Q. Seven days—that is eight days, is that right?

A. Yes sir.

Q. And two of them, being one dead-heading—

A. I received $30.00 and I should have received $40.00. They owe me for about 11 days now.

Q. That is additional then, this shown on here? Those days follow that period when Shannon told you to go back and you would get paid?

A. Yes sir.

Q. So they owe you for 11 days?

A. They owe me for 11 days.

Q. You have never been paid that?

A. No sir.

Mr. Jansen: I don't see any use cluttering up the record with this unless you want it filed.

Mr. Whitwell: I don't care about putting it in. I really want a chance to examine it.

Further this witness saith not.

The next witness, J. B. ALLEN, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your full name is what?

A. John B. Allen.

Q. How are you employed?

A. I am with the Gallagher Plumbing and Heating Company at the present time.

Q. How old are you?

A. Forty-eight.

Q. You live here in Nashville?

A. Yes sir.

Q. You are a plumber by trade?

A. Yes sir.

Q. How long have you been a plumber?

A. About sixteen years.

Q. Did you ever work or do any cubbing with the NC&StL Railway?

A. Yes sir, I did.

Q. When was that?

A. That was starting December 4, 1944, and ending December 31st.

Q. You have heard the testimony of Mr. Arnold and Mr. Justice?

A. That is right.

Q. Did you run on the same trains that Mr. Arnold testified about, on the same runs?

A. I don't know about the same trains but I suppose the same runs, to Cowan and Bruceton.

Q. Now, I call your attention to your record with the NC&StL Railway and call your particular attention to that part of of the record dated December 3, 1943, addressed to John B. Allen, Student Brakeman, and the schedule. Is that the schedule that was given to you?

A. That is right.

Q. By the Company?

A. That is right.

Q. By Mr. Shannon?

A. That is right.

Q. Did you complete that schedule?

A. No, I missed out on part of the schedule.

Q. Can you tell us how it was you missed out on part of the schedule?

A. Well, after I had cubbed, I think, about a couple of weeks, something like that, I decided I wasn't going any further with it and I stayed out a couple of weeks and went back down to turn in my equipment and Mr. Shan-

Q. After you took this examination did you go on the extra board?

A. No sir.

Q. Never were on the extra board of the NC&StL Railway?

A. No sir.

Q. Did you ever go on the seniority roster of employees of the NC&StL Railway?

A. No.

Q. Now, give me the date of the first day that you cubbed with the NC&StL Railway.

A. The 18th day of June.

Q. What are the regular paydays for the positions of brakemen and firemen?

A. What is what?

Q. The regular paydays. They pay semi-monthly, don't they?

A. I don't know what days they pay; I don't know.

Q. Do you know whether these paydays are on the 10th and 25th of each month?

A. Somewhere around there but I don't know exactly what dates.

Q. Assuming that the first payday was the 25th after you went on on June 18th, you had worked how many days up to that time?

A. I worked the 18th, 19th, 20th and 21st, and then I worked two days one day, and had a Martin turn-around the 22nd and 23rd.

Q. Then you worked six days from the time you started up to the 25th, didn't you?

A. I worked eight days. I worked seven days and one day for examination made eight days.

Q. This one day for examination—that one day you are talking about, that came in at the tailend of your cubbing?

A. No, it came in at the first. That was very short notice because Mr. Shannon told me the day that I filled out my papers—I had done took my examination because Mr. Talley hired me to go on the Huntsville Division and sent me to Decherd and the man down there told me that there wasn't enough work down there to justify me to stay and I come back. He carried me over to Mr. Shannon and Mr. Shannon—I had done taken my examination,

and Mr. Shannon says: "Do you know you get paid for the day you have taken your examination?" I said: "No" and and he reached over and got a card and filled it out and signed his name on it for $5.00.

Q. You are talking about physical examination?

A. That is what I am talking about.

Q. You say you were paid for six days cubbing?

A. I worked the 18th, 19th, 20th, 21st, 22nd and 23rd, and one day, on the 21st, had a Martin turn-around, from Bruceton to Martin on the turn-around.

Q. Well in any event, you worked from the 18th to the 23rd?

A. Yes sir.

Q. You cubbed those days?

A. Yes sir.

Q. You were paid $30.00?

A. $30.00 for eight days.

Q. And you claim now you weren't paid for the day you spent taking your examination?

A. When I made this dead-head trip and the Martin turn-around I come back here and I called up Mr. Talley and told him about the dead-head trip and the Martin turn-around and he says: "Well, you didn't get any experience out of this dead-head trip. We won't pay for dead-heading and the Martin turn-around." I says: "O.k., I will quit right here." I says: "I don't want to have any more to do with you; I will quit." He says: "No, don't you quit." He says: "You go on and finish your cubbing and I will pay you for your two days" and he didn't do it.

Q. What was the date that you received your voucher for those six days that you cubbed and were paid for?

A. I don't remember just what date it was. It was some time while I was cubbing. Some of them asked me if I had been up and got a pay day and I told them no and I went up there. It was a few days after pay day or something, anyhow, it wasn't right on the day and I went up and asked for the check and it was $30.00 and I went over to see Mr. Shannon and told him it wasn't right and he says: "We will make it right. You go on and finish your cubbing" and I taken him at his word and went on.

Q. Now, your quarrel with Mr. Shannon about the cubbing situation and about the day you took your physical examination, did that occur before you completed your cubbing?

A. Yes sir.

Q. You had this misunderstanding or quarrel before you went on and cubbed some more days?

A. He told me if I would go on and finish my cubbing he would pay me for those two days and I went on, and then after I had done my cubbing and taken the examination, I went down to get my money and they said I wasn't even on the payroll, so I went back to see Mr. Shannon and he says the reason I didn't get any money was "because I am not going to pay you for a Martin turnaround and the dead-head trip." I says: "Here is your job. I am through with you." I gave him the key and the lamp and I told him, I says: "Well, who must I see besides you to get this money?" And he said: "Now, you try to get it." I said: "I will do my best" and that is the last talk I had with him.

Q. What was the date of that controversy?

A. About somewhere around the 12th or 15th of July or somewhere right in there; I don't know just what date.

Q. And so you were pretty mad, weren't you?

A. Well, right at that time I guess I was.

Q. Pretty mad, aren't you, now?

A. No.

Q. In a good humor now?

A. Yes sir, that is right.

Q. Do you know whether or not you quit the Company or quit your cubbing, or whatever it was, before the arrival of the next regular pay day when payments were made by the paymaster's office?

A. I quit, it was on—let's see, on the 8th—that was on Saturday and the next Friday was when it was along about pay day time. Anyhow, the rest of them was getting their money anyway and I didn't get any.

Q. Well, you had quit, hadn't you?

A. Yes sir, I had quit.

Q. You had quit?

A. Yes sir, I quit because he didn't pay me.

Redirect Examination

By Mr. Jansen:

Q. Mr. Justice, I am calling your attention to this record. Is that your record with the NC&StL Railway? If you will skip through it and see if it is. (Witness looks through file.)

Q. That top part you didn't write. Let's get down here and see if this is the examination or the application that you filed. (Looking through file.)

A. Yes sir.

Q. Was this the schedule that they gave you here, dated June 17th?

A. Yes sir.

Q. And the dates shown on there are those days you spoke of, the 18th, 19th, 20th, 21st, 22nd and 23rd and so on.

A. Yes sir, seven days there. That was on the Nashville Division with Mr. Crimm. You see this dead-head trip he has got down here but he has left out something there. I don't what it is.

Q. Who wrote in this about the dead-head trip?

A. I wouldn't know who done that.

Q. Something has been rubbed out.

A. Because I think it is signed by Mr. Crimm, but this one down here has been changed.

Q. And this is the schedule dated June 17th starting with June 26th with the signatures.

A. This is a trip with J. D. Phillips and here with E. V. Slater on baggage. One trip on local with V. L. Baker.

Q. Then this form here would seem to indicate you appeared before the examiner, before Pursley.

A. He is the man that gave the examination.

Q. That is dated July 13, 1944?

A. Yes sir.

Q. You appeared there that day?

A. I appeared there on Monday after I made a trip on local, which was the 8th, and that was about the 10th. We started on Monday and it was the 8th when I made trip on the local, which was on Saturday.

Q. Now then, on the top here we have a letter dated July 17, addressed to you. Did you ever get that?

A. Yes sir.

non advised me to go ahead and finish my cubbing, and he told me, he said he thought I had a good chance to make a good brakeman and I showed good promise and all and to go ahead with it. So I started again and cubbed a couple more weeks and quit.

Q. Now, I call your attention to this schedule again, dated December 3, 1943. Can you tell us where you left off, what point?

A. It is checked off here.

Q. Which item is checked off?

(Witness examines record.)

A. This is where I missed out.

Q. You are starting now with December 16th, where you started missing?

A. Yes sir.

Q. And it was from that point on that you missed?

A. Yes sir.

Q. You had cubbed the entire schedule from December 4th, it seems, to and including the 15th?

A. Yes.

Q. Now, the schedule starting with December 16th refers to No. 21, 23, 22, pusher engine and then 23 and 22.

A. I had a new schedule. I started it all over again.

Q. You mean they gave you a new schedule and you started these runs, the remainder of these runs all over again?

A. Yes sir.

Q. I call your attention to this, dated December 1, 1943. Is that the next schedule that they gave you?

A. Yes sir.

Q. And these are the exact runs, except for different dates they were shown that you hadn't completed on the original schedule?

A. Yes sir.

Q. That is signed by the trainmaster, isn't it?

A. Yes.

Q. Now, at the time you finished cubbing did you take an examination?

A. I didn't go through it. I quit before I finished.

Q. At that time did you get paid for this cubbing?

A. No.

Q. Have you since been paid?

A. No.

Q. Have you been paid anything for your cubbing?

A. No.

Q. Do you remember how many days altogether you cubbed?

A. Eighteen days.

Q. And that was started on the 3rd of December?

A. That is not including the day I spent taking the examination.

Q. Now, they have got a notation on the top here saying "Paid for sixteen days." Is that correct? On the top of your record.

A. I cubbed eighteen days.

Q. And you weren't paid anything?

A. No. In fact, I think the record shows eighteen days cubbing.

Q. Yes sir, it shows here eighteen days in December and two days in January.

A. Yes.

Q. And then they say down here: "Paid for 16 days, $80.00."

A. No, I wasn't paid.

Q. You were never paid anything?

A. No.

Q. You haven't been paid yet?

A. No.

By the Court:

Q. What year was that?

A. That was 1943, December, 1943.

Mr. Jansen: Started December 3, 1943, after this so-called arrangement went into effect.

Q. Will you offer this as part of the record in the case, part of your testimony?

A. Yes sir.

Mr. Whitwell: If your Honor please, I have no objection to it going in under the order that you gave in reference to the other. I would say this, I would like the permission of the Court to withdraw the exhibits and bring

them back tomorrow. I would like to have an opportunity to examine them. I haven't had that opportunity.

The Court: Very well, the same order.

Mr. Jansen: Of course, it is your record.

Q. Now, as I understand it, Mr. Allen, you were given the original schedule which showed all these dates and trains that you were to cub on?

A. That is right.

Q. And when you went back to Mr. Shannon he caused you to go back to work and he gave you another schedule which made up the difference?

A. Yes.

Q. Did he ever tell you at any time you didn't have to follow the schedule?

A. No.

Q. Did he tell you any time you could quit and start when you wanted to?

A. No.

Q. He told you to follow the schedule?

A. Yes sir, he told me to follow the schedule.

Cross Examination,

By Mr. Whitwell:

Q. Just two or three questions in that regard. You didn't follow the first schedule that was handed to you after you filled out your application, did you?

A. I did not, no sir.

Q. You lacked a whole lot of following it?

A. Yes sir, several days.

Q. And you cubbed there for a few days and you stayed away from the Railroad for a week, you say?

A. I think it was nearer two weeks.

Q. You just don't like the Railroad work much?

A. No. I didn't intend to go through with the work.

Q. And that is the reason you, after cubbing just a few days, you stayed off a couple of weeks?

A. Well, I was sick when I left the job and that was one reason I didn't go through with the cubbing.

Q. Well, Mr. Shannon, instead of telling you that since

you didn't go through with the schedule that was first suggested to you, that you couldn't cub any more, why, he requested you to cub some more, and finish out your cubbing, didn't he?

A. Yes sir, he did.

Q. And more or less begged you to go on with it; he thought you would make a good man?

A. That is right. He sure did.

Q. And he finally persuaded you to go back?

A. Yes sir.

Q. To cubbing?

A. Yes sir, and I always hated to start something I didn't finish.

Q. And you did come back and cub a while and you just gave it up, didn't you?

A. That is right.

Q. And got you a job somewhere else?

A. Yes sir.

Q. Did you understand, Mr. Allen, when you made your application that if you finished your cubbing that you would be paid $5.00 a day for the cubbing?

A. Well, Mr. Shannon told me the day—the day I started my cubbing he told me that I would be paid $5.00 a day. He had that information for me. Well, he told me, he says: "I have got good news for you. You will be paid $5.00 a day for your cubbing."

Q. Do you recall whether or not he said to you if you didn't complete your cubbing that you wouldn't be paid?

A. No, he didn't say that.

Q. You don't remember that part of it?

A. No sir.

Further this witness saith not.

The next witness, E. W. BUGG, JR., being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your full name is E. W. Bugg?

A. Yes sir.

Q. Have you ever worked for the NC&StL Railway?
A. Cubbed for them, yes sir.
Q. Did you ever get on the extra board?
A. No sir.
Q. How old are you?
A. Twenty four.
Q. Where do you work now?
A. Red Oak Express Company.
Q. What kind of work do you do?
A. Over-the-road truck driver between Nashville and St. Louis.
Q. Did you ever have to cub with them?
A. No sir.
Q. You drive a truck?
A. Yes sir.
Q. Started right in driving the first day?
A. Yes sir.
Q. When was it you cubbed for the NC&StL Railway, do you remember?
A. In 1944.
Q. Do you have some record with you that shows that?
A. Started on the 9/28th.
Q. This record that you have here is dated September 27th, is that right?
A. Yes sir.
Q. Is that a list of schedules?
A. Yes sir.
Q. Who furnished you that?
A. Mr. Shannon.
Q. How many days did you cub?
A. Thirteen days altogether.
Q. Now, you heard the testimony of these other witnesses here?
A. Yes sir.
Q. Were you cubbing as a brakeman?
A. Yes sir.
Q. Did the schedule you had, furnished to you by Mr. Shannon, did that cover substantially the same trains, same kind of trains that Arnold was on?
A. All locals, except one. I made one trip in the baggage car.

Q. You were on all locals?

A. Yes sir, all locals except one.

Q. Did you do the work as here described by Mr. Arnold?

A. Yes sir.

Q. Did you ever get paid for it?

A. I got paid $20.00.

Q. And you worked how many days?

A. I worked twelve days and I was supposed to have gotten paid for the day I taken my physical examination.

Q. That would make how many?

A. Thirteen days.

Q. And you got paid for how many?

A. Four days.

Q. Now, did the Railroad ever give you any kind of notice or anything about what they had paid?

A. Yes sir, they—I got an income tax return. (Handing paper to counsel.)

Q. Have you got it with you?

A. Yes sir

Q. Where did you get it?

A. It was mailed to me by the Railroad.

Q. And that shows you were paid $55.00?

A. Yes sir.

Q. Did you, in fact, receive $55.00?

A. I received $20.00 pay.

Q. Is that all you got from the Railroad?

A. That was the gross pay, $20.00.

Q. I would like for you to offer both of these papers that you have as part of your testimony. Did you ever ask the Railroad for $5.00 for each of the days that you cubbed?

A. Yes sir.

Q. When was that?

A. That was approximately a week or a week and a half after I quit. I didn't quit. I had a motorcycle and I had a wreck on this motorcycle and I had an injured leg and I was laid up and my finances run low so my wife—I was still in bed—she went up there to see about getting my check. Well, the paymaster told her that I didn't have any check. Then she came back and I went the next day and called Mr. Templeton.

By the Court:

Q. Who was Mr. Templeton?

A. He was paymaster.

Q. What did he say?

A. I asked him about my check and he said if I didn't finish my cubbing I didn't get the rest of my time.

Q. And you were in the hospital at that time?

A. No, I was at home.

Q. You were laid up, though?

A. Yes sir.

By Mr. Jansen:

Q. Did you go back again and ask them for it?

A. No, I called him again in about a week from that and asked about it again and he still told me the same thing and then I was getting to where I was able to get around and go to work. Right after that I got a letter from the Railroad asking me if I would finish my cub running and wanted to know if I was ready to take the examination. At that time I had figured if I hadn't got my pay for what I had already done I wouldn't get no more so I went to work somewhere else.

Q. You mean they wrote you a letter asking you if you had finished your cubbing?

A. Yes sir.

Q. And said if you had you should report for examination?

A. Yes.

Q. In the meantime you had gotten a job somewhere else?

A. Yes sir.

Q. Did this cost you any money, any expense, when you were cubbing?

A. Yes, you have your expenses on the road and the expenses while you were on the other end of the line. You had to lay over at the end of each trip.

Q. What kind of expenses were those?

A. Hotel bill and your eating expenses.

Cross-Examination,

By Mr. Whitwell:

Q. Mr. Bugg, this $5.00 a day for the four days that you were paid, that took care of your expenses for those days, didn't it?

A. For those four days, yes sir.

Q. Now, you say there was some dispute between you and the Company about how many days you were paid for?

A. No sir, I didn't say that.

Q. Now, you say you were notified that if you finished —or you were notified if you cubbed and quit before you completed your cubbing you wouldn't be paid?

A. Yes, I was notified that after I had already quit.

Q. Now, you said you were told something about being paid $5.00 a day during your cubbing period. You were told something about that at the time you made your application, weren't you?

A. Yes sir. There wasn't any "if" in there. They plainly said I would be paid $5.00 a day for my cubbing.

Q. So whatever he may have meant, you understood from that conversation that you would be paid $5.00 whether you completed it or not? Is that right?

A. That is right.

Q. Now, during this period that you did cub you were cubbing with a regular crew, weren't you, a full crew?

A. Yes sir.

Q. And you were asked, more or less, to adopt the testimony of another witness, Mr. Arnold, I believe it was, in reference to the circumstances under which this cubbing was carried on. This cubbing that you did was to learn, as Mr. Arnold said, learn the road and the duties of the job that you applied for?

A. Yes sir.

Q. Just as he stated. You were cubbing with this regular crew and you did nothing in regard to your cubbing that the regular man wouldn't have done had you not been with the train, did you?

A. No sir.

Q. You say you cubbed a while and quit?

A. Yes sir.

Q. And never did get on the extra board?
A. No.
Q. And never did take a written examination?
A. No sir.

Further this witness saith not.

(Recess.)

The next witness, C. L. HOOKS, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your full name is what?
A. Clarence LeRoy Hooks.
Q. Where do you live?
A. 800 Shelby Avenue.
Q. Nashville, Tennessee?
A. Nashville, Tennessee.
Q. How old are you?
A. Forty-three.
Q. How are you now employed?
A. Fireman, NC&StL Railway.
Q. How long have you been a fireman for the NC&StL Railwey?
A. I established my age 6/27/43.
Q. June 27th, 1943, is when you established your seniority?
A. Yes sir.
Q. Prior to that time were you required to cub with the Railroad?
A. I was.
Q. How many days did you cub?
A. Thirty-one, I believe.
Q. And did you take different runs with the Railroad?
A. Yes sir.
Q. Cubbing?
A. Yes sir. I had a list, in other words, a schedule made up for me for the various runs I was to make.
Q. Did that schedule include all those runs?
A. Yes sir.

Q. Did that include work as hostler helper?

A. Yes sir.

Q. That was done first?

A. Yes sir.

Q. And then the work on the road?

A. Yes sir.

Q. As a cub fireman did you do any work?

A. Yes sir, I did part of it.

Q. What was the type of work you did?

A. Well, the usual work that a fireman would do. In other words, in cubbing you have to take a hold if you ever learn.

Q. Did you take hold?

A. Yes sir.

Q. And do the work?

A. Yes sir, as I could.

Q. What did the other fireman do?

A. Well, he instructed me while I was doing the work.

Q. Did that include work on Diesels?

A. No sir, not with the NC&StL I didn't, steam engines only.

Q. Stoker-fired?

A. Yes sir.

Q. As well as hand-fired?

A. Yes sir.

Q. Were you ever paid for any of the thirty-one days that you cubbed?

A. No sir.

Q. Did you have any expense cubbing?

A. Yes sir, you have your road expense, hotels and eating.

Q. Did you have to pay that expense all yourself?

A. Yes sir, with the exception of maybe a couple of times the fireman would buy my lunch on the other end of the line. I believe it is an old custom with the firemen maybe to help you out on your expense and occasionally buy you a lunch once in a while, something like that. Anyway, they did a couple or three times for me.

Cross-Examination,

By Mr. Whitwell:

Q. Mr. Hooks, if I understood you correctly, you did your cubbing prior to June 27th, 1943?

A. That is right.

Q. And back at the time you made your application for the position of fireman and during the time that you were cubbing you understood that you were not to be paid for the time that you spent cubbing, didn't you?

A. That is right.

Q. And you understood, of course, that when you made your application that it was necessary for you to cub or train for a while to learn the duties of the position that you applied for?

A. Yes sir.

Q. And you had several miles of road to learn, didn't you, Mr. Hooks?

A. Yes sir.

Q. You had the mileage from Chattanooga, Tennessee, to Hickman, Kentucky, through Nashville, didn't you?

A. That is right.

Q. And during that cubbing period you had to learn all of the line and how to fire a hand-fired engine?

A. Yes sir.

Q. And you cubbed on different types of stoker-fired engines, didn't you?

A. Yes sir.

Q. And there are some three or four different types of stoker-fired engines, aren't there?

A. Yes sir.

Q. And there are some differences in all of them, aren't there?

A. That is right.

Q. And you had to learn those differences, didn't you?

A. Yes.

Q. And the regular fireman was there and he told you different things about the locomotives, about the water gauges, and taught you different things about how to use those stokers, didn't he?

A. That is right.

Q. And you had no way of getting that information

and learning the activities of a regular fireman without going through that experience and that training, did you?

A. That is correct.

Q. And everything that you did in connection with firing or learning the duties of a fireman was something that the regular fireman was there to do and paid to do, wasn't he?

A. Yes sir, that is right.

Q. And you had no duty and no responsibility in connection with the operation of any engine that you cubbed on, did you?

A. No, not any responsibility.

Q. And whatever you did by way of operating the different appliances on one of those locomotives was done for your benefit in order that you might learn the duties of the job that you hoped to get after that, wasn't it?

A. Yes sir.

Q. Had you had any experience in firing a locomotive at any time before you began cubbing with the NC&StL Railway?

A. No sir.

Q. The whole thing was brand new to you, wasn't it?

A. That is right. I had fired a boiler but not a locomotive, a stationary boiler.

Q. And any train that you fire on would have gotten from where it started to where it went just the same if you hadn't been with the locomotive, wouldn't it?

A. Yes sir.

By Mr. Jansen:

Q. What kind of boiler was it you had experience on?

A. Stationary boiler, marine boilers.

Q. Is there some similarity between firing a marine boiler or marine boiler and a locomotive?

A. Very little, to be exact.

Q. Sir?

A. Very little, to be exact.

Q. What is the difference?

A. Well, there is just a lot of difference, to be exact. I don't know that I could explain it so you would understand it.

Q. Is there any difference in shoveling the coal?
A. Well, yes sir, quite a bit.
Q. How is that?
A. A locomotive is much harder to fire.
Q. Then when you were cubbing on a locomotive shoveling coal and firing you worked harder than you did when you were working on a marine boiler, is that right?
A. That is right.
Q. Did you have to cub for your marine boiler job?
A. No sir.
Q. Or that stationary boiler job?
A. No.

Further this witness saith not.

The next witness, S. T. PORTER, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your full name is what?
A. Samuel Thomas Porter.
Q. Where do you live?
A. 112 Blackburn Drive, Nashville, Tennessee.
Q. How old are you?
A. Forty-four.
Q. How are you now employed?
A. By the United States Department of Labor, Wage and Hour Division.
Q. In what capacity?
A. Inspector.
Q. How long have you been an inspector for the United States Department of Labor, Wage and Hour Division?
A. Since January, 1943.
Q. As inspector of the Wage and Hour Division, United States Department of Labor, did you have occasion to make an inspection of the NC&StL Railway?
A. Not over the entire system; Nashville and Chattanooga only.
Q. And in the course of your inspection of the Nashville

and Chattanooga parts of the NC&StL did you have occasion to examine their records?

A. Yes sir.

Q. Did you find any records at all with reference to cubs, student brakemen, firemen and others?

A. Quite a few in both locations.

Q. What kind of records did you find?

A. In Chattanooga for the most part was ledger records maintained by Mr. Born. Mr. Johnson also had some records in his department, and for the most part, Nashville was personal files of the employees and also some records Mr. Shannon had.

Q. Did those records of those students contain the hours worked?

A. No sir.

Q. Or the amount of compensation paid?

A. In some cases, yes sir.

Q. In all cases?

A. No.

Q. Did you have occasion to take off the record list of all the various cubs, both in office work and road work, who had performed as cubs and had not been paid?

A. I did.

Q. And did anyone with the Railroad help you with that?

A. Yes sir, there was quite a bit of help given me by Mr. Born, Mr. Shannon and Mr. Cunningham, I believe, and then there were a couple of men over in the accounting department, I don't recall their names right now.

Q. Now, with reference to the Chattanooga end, did you take a list of the student callers, messengers, porters, stenographers and clerks who had performed as students who had not been paid?

A. I did.

Q. Do you have that list with you?

A. Yes sir.

Q. And did you have occasion, in taking off this list, to check it with Mr. Born?

A. Yes sir and also Mr. Johnson.

Q. Now, with reference to this particular list, can you find the name of Rosenhiem on that list?

A. Here it is.

Q. And when did you get that list or make it up?

A. It was sometime in October, I have forgotten the exact date.

Q. October what year?

A. 1944.

Q. And the name of Prince?

A. Right here.

Q. And did Mr. Born—did you have occasion to check both of those names with Mr. Born?

A. Yes sir.

Q. In October, 1944?

A. Yes sir.

Q. Will you offer this list as part of your testimony?

A. Yes sir.

(List filed as Plaintiff's Exhibit .....)

By the Court:

Q. What does this purport to be a list of?

A. Cubs at the Chattanooga branch and also the Nashville branch.

Q. And all of them or just some of them?

A. All of them.

Q. And for what time?

A. It won't cover cubs that were paid. It covers only the cubs that were not paid.

Q. Then how could you tell whether they were paid or not?

A. By statement from Mr. Shannon and this checked over in the auditing department and statement from Mr. Born at the Chattanooga office.

Q. Did you check to see whether any vouchers had been issued to these people?

A. No, I took the word of Mr. Born for it in the Chattanooga office and I did check vouchers in the auditing department.

Q. Well, did they show that these people had not been paid and were not going to be paid?

A. Yes sir.

Q. Why not?

A. They didn't show that they were not going to be paid. I don't know whether they were going to be paid.

Q. Well, you have heard that down at Chattanooga they made a mistake and they rectified that mistake now as far as possible. What about that in connection with this?

A. Well, I didn't discuss at the time with them as to whether they were going to pay them or anything about it. I was simply making a routine wage and hour inspection.

Q. Did you find that they were keeping record on these cubs as required by the rules and regulations?

A. Not accurate records, no.

Q. What?

A. No, not accurate records.

Q. They say now they pay the cubs—not cubs but the posters—in the office under the Wage and Hour Law. Did you find that to be true?

A. Not at the time of my inspection.

The Court: All right. Go ahead.

By Mr. Jansen:

Q. Now then, the list that you have handed in just includes the Chattanooga list, does it not?

A. That is right.

Q. Did you also make a list of the cubs in Nashville who had not been paid?

A. Yes sir, according to the records maintained in Mr. Shannon's office. I didn't pull all the personal files, every one of those, but the records Mr. Shannon had, I did make that list from.

Q. Will you file that as part of your testimony?

A. Yes sir.

(Filed as Plaintiff's Exhibit No. ——.)

Q. Now, I notice in connection with the list on the Chattanooga branch of the Railroad you have certain dates. Will you explain what those dates are?

A. Those dates were the dates the cubs were posted.

Q. You mean that was the last day?

A. That was the date they were posted on the board for work.

Q. Put on the extra board?

A. That is right.

Q. So that whatever cubbing or posting was done by them was done prior to that time?

A. Yes sir.

Q. And the dates on the Nashville part?

A. That was the date of the application, in this column here, and the date of the cubbing would have to be verified from the personal files.

Q. I notice on the Nashville part you have the heading: "Students who did not complete cubbing."

A. They were students or cubs who took part time cubbing and were not competent, according to Mr. Shannon's records.

Q. Well, is that true with reference to all of them under that heading, even those in early 1943, if you know?

A. I think so.

Q. And in the year 1942?

A. I think so.

Q. So there would be a number of cubs who might have completed their cubbing you didn't take any record of?

A. Yes sir.

Q. And did you determine at that time as to those who completed their cubbing prior to December 1st, 1943, brakemen or switchmen or firemen, that had been paid anything?

A. In some instances they had been paid.

Q. Prior to December 1st, 1943?

A. No, they hadn't been paid.

Q. None of those who had completed cubbing prior to that time had been paid?

A. According to statements made in the office.

Q. And this is a list of those prior to that time who hadn't completed their cubbing?

A. Yes sir.

Q. And since that time who hadn't completed their training and hadn't been paid?

A. Correct.

Q. Now, was it possible, Mr. Porter, with reference to the employees at Chattanooga to determine from the records, as to office employees, how many days they had posted?

A. No.

Q. Well, did you get any information at all about that?

A. Mr Born said that he was very familiar with the records and work of the employees and he could tell me approximately how many days they cubbed and the records were made on that day from statement made by him.

Q. Mr. Born has told us that—

A. Mr. Johnson—pardone me—also participated in the firemen, I believe, as to the time they cubbed.

Q. Mr. Born has told us that Mr. Rosenhiem cubbed fifteen days. Is that right? Do you recollect that? (Conferring with associate.)

A. I can find that for you.

Q. No, I was trying to recollect the testimony. My recollection of Mr. Born's testimony was that Mr. Rosenhiem cubbed for fifteen days. Did he give you any other figure during the time you were there?

A. I would have to check the files.

Q. Would you like to check them now?

(Witness checking the files.)

A. The time stated when I met him, the time, the maximum was twenty one days.

Q. At the time you made your inspection?

A. 5/16/44.

Q. He told you twenty one days?

A. Twenty one days.

Cross Examination,

By Mr. Whitwell:

Q. Mr. Porter, just a few questions. I understand that you made this inspection at Chattanooga in reference to persons who had posted there as clerks, yard clerks, callers, stenographers, messengers and porters back in October, 1944?

A. That is right.

Q. When you went there to make that investigation and went to Mr. Born's office was he quite cooperative with you about the hours in the office and any information that you desired?

A. His attitude was satisfactory.

Q. Such records as you called for, were they furnished you, if they were available, if he had them?

A. Yes sir.

Q. And you say he did give you his best recollection as to the posting period of any person you might ask about?

A. Yes sir.

Q. And it was from him that you got this list of persons who had posted at Chattanooga over the period that you were inquiring about?

A. With the addition of Mr. Johnson, I also got a record from him.

Q. Who is Mr. Johnson? I am not just familiar with him.

A. I am not so familiar with him myself. As I recall, he is another chief clerk down there in charge possibly of the firemen.

Q. And so you got your information with reference to these persons that we have been calling posters here, you got that from Mr. Born?

A. Yes sir.

Q. And the information which you got in reference to firemen was gotten from Mr. Johnson?

A. That is right.

Q. Now, Mr. Porter, have you made any investigation by either of these records in reference to posters and in reference to cubs since October, 1944?

A. Well, there was a small check made there, I would say, six or eight hours spent in the Chattanooga office.

Q. Now, if I understood you correctly, back at the time that you made this investigation in October, 1944, you took the list of persons, in reference to posting of persons, who had posted over the period about which you were inquiring and went to work on the dates shown on this Chattanooga Exhibit of yours, and were informed by Mr. Born at the time that these people had not been paid in accordance with the—had not been paid for the period of their posting?

A. Yes sir.

Q. Now, I believe you said you had not made any investigation recently or at all to determine how many of

those persons whose names you obtained from Mr. Born had been paid for their period of posting?

A. I haven't made an inspection since that time.

Q. And so if vouchers have issued for all those people you haven't checked to find out whether or not that is true, have you?

A. No.

Q. Do you know whether or not, back in February, vouchers were issued to a large number of the men appearing on this list in payment in accordance with the minimum provided by the Wage and Hour Law for the period while posting?

A. No, I haven't made an inspection since October, 1944.

Q. And you are not now in position to say, Mr. Porter, that the Railroad, as a result of your investigation and this lawsuit, has made a list and undertaken to go back and pick up and pay for the period of posting, which the Railroad contends, or its management, that was being done at the time?

A. No, I haven't checked their books since October, 1944.

Q. And you don't, therefore, know that that situation at Chattanooga, which the Railway claims was an oversight or failure to carry out instructions, you don't know that that has not been corrected already?

A. No sir.

Q. Did it take you some little time up there to make your inspection?

A. Quite a while, yes sir.

Q. This business of going through records is a rather laborious and time-consuming thing, isn't it?

A. Well, just routine inspection work.

Q. Now, did you at Chattanooga undertake to give a list of all the persons who had cubbed there for positions of firemen and switchmen in the Cravens Yards at Chattanooga?

A. Yes sir.

Q. And you think you have included all of those in this list?

A. I have all that were on Mr. Born's books at that particular time.

Q. Well, you have got your list of those who had cubbed for the position of fireman, you got them off Mr. Johnson's record?

A. Yes sir.

Q. And this exhibit, this Chattanooga exhibit, we will call it, these dates here, do they purport to show the dates that the men went to work after completing the cubbing period? Is that what they represent?

A. That is correct.

By the Court:

Q. What date is that, which column?

A. That is, I think you have the wrong one.

Q. Which column?

A. This column here (indicating).

Q. You say that is the date?

A. Yes sir.

Q. That is the date they are supposed to have finished their training and sent on the seniority list?

A. Yes sir.

By Mr. Whitwell:

Q. And on that date in that column, both for persons who posted and who cubbed for train service in the yards there, those dates represent the dates when they went on the seniority roster or established their seniority as employees, is that right?

A. Yes sir.

Q. Now, your Nashville list, if I understand this exhibit correctly, it is a list of persons who cubbed for positions in train service and who quit or who did not complete their training or cubbing?

A. Yes sir.

Q. I believe you say you made no list of those who cubbed over the period involved here and who did complete their cubbing and become regular employees?

A. That is correct.

Q. And you made no investigation as to those who applied for positions of firemen or brakemen in road service, or switchmen, if applicable, who were paid for the days that they cubbed since December 1st, 1943?

A. Now, state that question over.

Q. I say you didn't go in and undertake to ascertain the number of people who cubbed since December 1st, 1943, and whether or not they had been paid for the days that they cubbed?

A. I went farther back than that.

Q. How far back did you go?

A. I believe it was 1941.

By the Court:

Q. Did you make any record of those who completed their training and had not been paid this $5.00 a day?

A. No.

Q. You havent got that list?

A. I don't have a list.

Mr. Whitwell: That is what I was asking about.

Q. It was along about 1941 with this war period getting hot; that was about the period when they began putting on these people, they began cubbing for positions and there were vacancies of regular employees, that is about the period, isn't it?

A. I wouldn't say. I don't know anything about the employment situation there.

Further this witness saith not.

Mr. Jansen: Now, if it please the Court, we have a few other witnesses but I think their testimony would be more or less cumulative and in view of the wishes of the Court, I will refrain from calling them at this time.

The Court: I don't want you to feel unduly restrained. I want you to put your case on but I just don't see any point in piling up a lot of cumulative testimony after the picture has been thoroughly established, but I don't want you to feel that I am cutting you off from putting on witnesses.

Mr. Jansen: I understand, your Honor, I can reserve them, if necessary, for rebuttal, if we think it is necessary.

The Court: Are you ready for the Defendant? I understand you rest?

Mr. Jansen: Yes, your Honor, plaintiff rests.

Mr. Whitwell: The last statement he made was that he probably would reserve a lot of this testimony in chief for rebuttal. I would like very much for this testimony in chief, that it come as testimony in chief and that testimony in chief not be used for rebuttal purposes.

The Court: Well, if there is anything new about it, I will see that you are not taken advantage of.

Mr. Whitwell: I am sure of that. Now, if your Honor please, I suppose I could proceed but we are here at the half way mark. I understand your Honor quits at 4:30. I am not someone to make the request but it would be a great accommodation if we were permitted—

The Court: How much time do you think you are going to require for your testimony?

Mr. Whitwell: Of course, that depends a lot upon the cross-examination. I have the feeling now that we can complete it tomorrow.

The Court: Tomorrow is Friday and I understand it is not the custom to hold court on Saturday and it will have to go over until Monday if we don't finish tomorrow. About how many witnesses do you think you will have?

Mr. Whitwell: I will have some ten or twelve.

The Court: Are there any so-called long witnesses amongst them or are they all of reasonable duration?

Mr. Whitwell: Well, if your Honor please, I will have the superintendents of the two divisions. I will have a couple of chief clerks and I would think the balance of them would be very short witnesses on the actual practical operation, which is pretty well in this record anyway.

The Court: All right. We will take a recess now until 10:00 o'clock tomorrow morning and be ready then and have your witness on the stand.

Thereupon an adjournment was taken until in the morning at 10:00 o'clock.

EVIDENCE ON BEHALF OF THE DEFENDANT.

J. W. TUCKER, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Whitwell:

Q. Is this Mr. J. W. Tucker?

A. Yes sir.

Q. Where do you live, Mr. Tucker?

A. Chattanoga.

Q. How old are you?

A. Sixty-nine years old.

Q. What position do you hold with the NC&StL Railway?

A. Superintendent of the Chattanooga Division and the Huntsville Division.

Q. How long have you been superintendent of those divisions of the Railway?

A. Four years.

Q. What position did you hold with the Company prior to the time that you were appointed superintendent, immediately prior to that time?

A. I was assistant superintendent for about twenty-three years.

Q. Was that at Chattanooga?

A. Practically all that time. I was at Nashville seven or eight months the latter part of 1918 and the first part of 1919.

Q. Now, Mr. Tucker, I want to ask you a few questions in reference to the situation as regards what is termed in this record as posting by persons for the positions of porters, callers, messengers, clerks and stenographers. Did you hear Mr. McWhorter testify in respect to the fact that back in the early part of the '40s, about 1940, he issued instructions to his superintendents to pay posters during the period of their posting the minimum provided by the Wage and Hour Law and to keep records of the days and hours of such posting?

A. Yes sir.

Q. Did you get those instructions from the General Manager's office and from Mr. McWhorter?

A. I did.

Q. Now, in turn, did you at the time issue those instructions on down to your subordinates or those who took instructions from your office?

A. Yes sir.

Q. Now, Mr. Tucker, as far as you know and as far as you knew, were those instructions carried out at the various other places over your two divisions of the Railway except at Chattanooga?

A. They were.

Q. When did you first learn that your instructions, as you have stated, had not been carried out at Chattanooga?

A. It was when notice came out in the Chattanooga Times when suit was filed against the Company.

Q. Now, when this suit brought to your attention that there was a controversy about posting at Chattanooga did you immediately proceed to make an investigation?

A. I did.

Q. Did you find from your investigation that your instructions had not been carried out?

A. I did.

Q. At Chattanooga?

A. I did.

Q. You know Mr. J. E. Born, who testified here, I believe, on Wednesday in this case?

A. Yes sir.

Q. Is he the clerk in the yardmaster's office there at Chattanooga?

A. He is chief clerk to the yardmaster.

Q. Had you given him those instructions back when you first received them to pay posters for the period of their posting and to keep records of the time when posting?

A. I did.

Q. Now, when you learned that Mr. Born had either misunderstood your instructions or had overlooked them did you reprimand him for not having carried them out?

A. I discussed it with him. Yes sir, I did.

Q. Did you then instruct Mr. Born to furnish you a

list of people who had posted prior to the period involved in this litigation and who had not been paid and to give you a record, as best he could make it up, of the time of their posting?

A. Yes.

Q. Now, when you got that list of those who had posted prior to the time here involved without being paid did you furnish that list to the accounting department here in Nashville with instructions to issue vouchers for those people for their time posting, which you had up to that time thought had been paid currently?

A. Yes sir.

Q. Now, so far as you know, have those vouchers been issued in compliance with your instructions to the accounting department?

A. So far as I know, they have.

Q. If vouchers haven't been issued for some of them will they be issued?

A. They will, yes sir.

Q. Is it not the present practice of the Company, regardless of mistakes in the past, to pay posters currently the minimum provided by the Wage and Hour Law and keep records of the days and hours posted?

A. It is.

Q. Do you now say that the situation at Chattanooga has been corrected?

A. It has.

Q. Now, has the practice that you instructed the people under you to carry out on your divisions in reference to posting been carried out on other parts of the system, as far as you know?

A. They have.

Q. Now, something was said about Mr. Curtis Bomar, who posted at Fayetteville for a period and who was later employed and who is now employed as a clerk for the Company. Can you explain why Mr. Bomar was not paid at the time and hasn't been paid yet, if he has not, for the time while he was posting?

A. I can't account for it unless it was just an oversight in filing his papers but when I found that he had not been paid—I learned it just before I took the train

for Nashville—I immediately wrote Mr. Bomar to give me the dates of his posting and the hours posted each day.

Q. Did you also instruct your chief clerk there in your office to make an investigation and undertake to ascertain why his name had not been turned in and the period which he had posted?

A. I did.

Q. Was that for the purpose and with the honest intention of correcting that oversight?

A. Yes sir, and to prevent it in the future.

Q. Do you expect to do that?

A. I do.

Q. Now, outside of Mr. Curtis Bomar, do you know of any other single person who has posted over the period covered by the Wage and Hour Law or Fair Labor Standards Act who was not paid currently for the period of his posting?

A. So far as I know, they have all been paid.

Q. Now, Mr. Tucker, I understood from a witness, from Mr. Born, I believe, that the Company's practice in reference to delivering vouchers is that it will not mail a voucher to a person to whom it is made out unless the Company has written authority from that person to mail the voucher to him?

A. That is true.

Q. Now, in reference to these vouchers that have been issued to go back to make payment to these posters who were not currently paid did the paymaster at Chattanooga and elsewhere on your system hold those vouchers just as they hold other vouchers?

A. They do.

Q. What do you expect to do, if anything, in reference to giving notice to people who have vouchers at the paymaster's office, and especially in cases where they are not expecting them?

A. I am going to notify every person who has not called for their voucher that they have a voucher—that we have a voucher for them and to call and get it, and if they can't call and get it but will give me their home address and ask that we mail it to them, we will mail it

to the home address. I intend to do that just as soon as I get back to the office.

Q. In other words, you don't have any trouble about the fellow who is expecting a voucher getting it because—

Mr. Jansen: If the Court please, I think that is highly argumentative. I haven't objected to counsel's leading questions up to now but I think that question is highly argumentative, leading and suggestive. This is his own witness.

The Court: Overruled; go ahead.

By Mr. Whitwell:

Q. In other words, a person, Mr. Tucker, who is expecting a voucher, why, there is no trouble about your practice in reference to him either coming for the voucher or mailing it, if he requests it?

A. No.

Q. But in cases like this where a person probably is not expecting a voucher, you intend to issue instructions to get in touch with those people through the paymaster's office, get in touch with them and notify them that they have a certain voucher awaiting them?

A. Yes.

Q. Now, Mr. Tucker, in reference to this policy about which the General Manager testified Wednesday adopted December 1st, 1943, of paying persons who cubbed for positions of switchmen, brakemen or firemen $5.00 a day, I will ask you if you received instructions on or about November 30, 1943, to that effect, and if you received a letter, copy of which Mr. McWhorter introduced as exhibit to his testimony in this case?

A. I did.

Q. Now, as I recall that, the instruction, as shown in that letter, was addressed to the superintendents of the various divisions to pay persons while cubbing $5.00 a day, is that right?

A. Yes sir.

Q. Now, shortly thereafter I will ask you whether or not the General Manager issued instructions modifying those so as to provide that a person would be paid $5.00

a day during the period of his cubbing, provided he did not voluntarily quit, or provided he completed his cubbing?

A. That is right.

Q. Now, since December 1, 1943, when this policy of paying cubs $5.00 a day was adopted have you kept the names and records of all persons who cubbed for positions of switchmen or firemen in yard service at Chattanooga, and have you turned in to the accounting department currently the names of all those persons and the dates and sometimes the hours that they spent in cubbing in all cases where you did not know that they had quit or intended to quit cubbing.

A. That is right. We have, yes sir.

Q. Do those persons, while cubbing, do they keep a time card or something like that showing the days cubbed and the trips?

A. Yes sir, they are required to make out a time card which shows the hours worked and then that ticket or card is okayed by the foreman of the engine he works with and that is turned in to the general yardmaster or chief clerk of the yardmaster, and that is turned in to the accounting department at Nashville.

Q. At Nashville?

A. At Nashville, for payment.

Q. Now, so far as you know, since December, 1943, have all those names and the periods of their cubbing, those time tickets you spoke of, gone to the accounting department as to all those who were undergoing a cubbing period and who you didn't know had quit or would quit?

A. Yes sir.

Q. Were those sent in currently?

A. Yes sir.

Q. Were vouchers issued currently for all of those people?

A. So far as I know they were.

Q. Now, the people who were not turned in currently to the accounting department, were they people who had cubbed for a while and you learned that they had quit, had not completed their cubbing and, therefore, had not been paid?

A. Yes sir.

Q. Now a few months ago, back around the first of the year, I will ask you whether or not the General Manager's office gave the superintendents further instructions to the effect that some of these applicants claim that they misunderstood the instructions, who were under the impression that they would get $5.00 a day regardless of whether or not they completed their cubbing, and the General Manager instructed the superintendents to turn in the names of all who had cubbed and quit their cubbing and whose names had not heretofore been turned in to the accounting department, with instructions that they go back and be picked up, so to speak, and paid for the days of their cubbing?

A. Yes sir, I received those instructions.

Q. Now, did you comply with those instructions and have those names all been sent in?

A. I did.

Q. Now, do you know whether or not vouchers have been issued to cover those people?

A. I am told they have been.

By the Court:

Q. Do you now pay cubs $5.00 a day regardless of whether they complete their cubbing or training or not.

A. We do.

Q. Even if a man comes and works one or two days and then quits, you pay him $5.00 a day for those days?

A. Yes sir.

Q. How long has that policy been in effect?

A. Soon after—I am not sure as to the date the General Manager issued those instructions.

Q. Well, about when?

A. I believe it was January of this year.

Q. Is that the policy to be followed now and in the future?

A. Yes sir.

The Court: All right.

By Mr. Whitwell:

Q. If that policy is to be changed, I take it it would be changed by the General Manager's office?

A. The General Manager would have to issue instructions to change it.

Q. Now, I want to ask you a few questions about this cubbing practice.

Mr. Whitwell: I am trying to be as brief as possible, your Honor.

Q. Has the NC&StL Railway had a policy of requiring written applications, physical examination and cubbing, and written and oral examination following cubbing as a preliminary step to the employment of persons for the positions of firemen, brakemen and switchmen?

A. Yes sir.

Q. Is that a practice of long-standing with this Railway?

A. Yes sir.

Q. Is it a practice and custom of long-standing among railroads generally throughout the country?

A. I am informed and understand it is.

Q. Now, Mr. Tucker, do you give general instructions to the people who have charge of receiving those applications as to receiving the applications and advising the applicant that he will have to go through this cubbing period and the physical examination and those things?

A. Yes sir.

Q. Generally speaking, take the position of switchman, for example, why does the Company require a person to cub before it will consider him qualified and before it will employ him?

A. It is necessary, if he hasn't had previous experience, that he learn the different signals. He must learn the location of the tracks, the location of the different switches and industries in the different districts and know how to take care of himself and avoid injury and learn to keep cars in side tracks and off the tracks and avoid injury or damage, and to learn whether the yards are on grades or level, know how cars must be handled in switches to avoid damage to them and where there are signals in connection with the yards, that is, interlocking plants; he must know all them.

Q. Does he undergo his cubbing or training with a regular crew, what we call a full crew of regular employees?

A. Yes sir.

Q. Whatever activity that he performs in connection with his training, is that for his benefit that he learn the job that he has applied for?

A. Yes sir.

Q. Is such person even considered by the Company as an employee during the period of his training?

A. No.

Q. Does his training advance the work or is it a burden in any way to the Company during the period of his cubbing?

A. No, it is not.

Q. Does he have any duty or any responsibility whatsoever in connection with the railroad operations?

A. No sir.

Q. Now, I understand that as to a regular employee, if there is some infraction of a rule, he may be disciplined by being given what you call demerits or record suspension. Does anything like that apply to a person while cubbing?

A. No sir,

Q. Now, in reference to road service, candidates or cubs for positions in road service, I understand that a person who applies for a position in road service makes application here at Nashville for the Chattanooga Division and for the Nashville Division?

A. That is true.

Q. You are familiar, I take it, with the roadbed and physical conditions between Nashville and Chattanooga, which is your division?

A. Yes sir.

Q. Now, as to road service cubs, is it necessary that they undergo a training period such as you have described in reference to switchmen?

A. Yes sir.

Q. Are there quite a few towns between Nashville and Chattanooga, yards, side tracks, switches, and block signals that a regular brakeman has to know and a regular fireman has to know and that a cub has to learn?

A. Yes sir.

Q. Does that person who cubs for the position of brakeman or fireman in this road service, does he also cub with a full crew of regular employees?

A. Yes sir.

Q. Is he taught by those regular men and does he observe their work and also actually perform some of it in the course of his training in order that he might learn the duties of the position which he hopes to get later on?

A. He does.

Q. You have been talking about the necessity of a person cubbing for a period for the position of switchman and you have given some of the reasons why it is necessary that such cubbing be carried on. Is what you have said as to switchmen also true, even more true as to candidates for positions of firemen and brakemen in road service?

A. It is.

Q. Do the same reasons why a cub must—why a person must cub for the position of brakeman in road or yard service, do those same reasons obtain as to why it is necessary for a person applying for the position of fireman must also undergo a cubbing or training period?

The Court: I think you have made that situation very clear, Counsel. I understand that.

Q. What about that class of employees that you call posters? What is the necessity for their undergoing posting and training?

A. They fill clerical positions and there are so many different types of work in our offices that they must learn that it is necessary for them to go in and learn or get a fairly good idea of it.

Q. What about janitors and porters?

A. Well, janitors, some of them look after some of our matters in addition to the offices and other work they wish them to do, and it is necessary for them to learn where they have to do the work and just how it is done.

Q. Some of these people that look after this have to go out in the yards and be out amongst operating trains?

A. Yes sir, some clerks are inside clerks and some of them are outside clerks that get tonnage, check refrigerator cars to see whether they need icing, get the seals of

cars arriving, initials and numbers of cars, how they stand in the train and mark them.

Q. Do you find from your experience that a green hand can't do that?

A. Yes sir.

Q. It takes training to do that?

A. Yes sir.

The Court: I think I understand that, Counsel.

Mr. Whitwell: I want to ask one more question, one or two, and then I am through.

Q. Persons who apply for positions of brakemen or firemen in road service, after they undergo this training or cubbing period, are they always required to take a written and oral examination and pass it before they qualify for employment?

A. Yes sir.

Q. Now, normally and when practicable, is that true also as to persons applying for positions as switchmen or firemen in yard service?

A. We try, when a cub has completed his training, to have the train rule examiner examine this man. During this war period it has been at times impossible to do that because we had so many men on the main line, more important, and he couldn't come to Chattanooga to examine those men immediately but would go as soon after as he could, but just as soon as we can get the train rule examiner up there we do examine those.

Q. Now, as I understand it, trains on the main line of road always run under train orders but engines in yard service, they don't switch by any train orders, do they?

A. No.

Q. Do men in yard service have fewer rules to contend with than those in road service?

A. Yes sir, they do.

Q. And so, if I understand you, where practicable it is desirable that they first undergo this examination but in these war times it is practically impossible to meet that desire at all times and frequently persons are put on the

roster of employees in switching service before they have taken this examination?

A. Yes sir, although they are putting on an additional train rule examiner to try to keep up.

Cross-Examination,

By Mr. Jansen:

Now, if it please the Court, before I begin the cross-examination of this witness, so that there will be no question about the position of the Plaintiff and that we can save time, I would like to state at this time that if the Defendant will, in open court, freely, fairly, openly and unequivocally admit that the people or persons who, while posting for this office work and while cubbing for the jobs of switchman, brakeman and fireman are employees under the Fair Labor Standards Act, and if they will also, in open court, unequivocally agree to comply with the Fair Labor Standards Act as to those employees in the future both as to the minimum wage requirements and regarding the keeping of records, then I would ask the Court for leave to dismiss this case.

The Court: All right, Counsel, what do you say to that?

Mr. Whitwell: If your Honor please, we don't make any such statement. Our position is stated in our answer. We don't think these people are employees and that such payments as have been made have been what has been explained as incentive payments and we do not make any admission at all that these persons are employees or that persons, while cubbing, are employees. We have simply elected to treat posters as if they were employees and, therefore, I respectfully decline to make any such admission as we are called upon to make.

Mr. Jansen: Very well.

Q. Mr. Tucker, where are your offices?
A. Over the Union Depot, Chattanooga.
Q. And where are the offices of Mr. Born?
A. Cravens Yard.
Q. Do you ever get out to the Cravens Yard?
A. Yes sir.

Q. Do you have occasion to be out there quite frequently?

A. Well, I go as often as I can.

Q. Would you say you are out there daily?

A. No.

Q. How many times, on the average, a week would you go out there?

A. Some weeks I don't go at all and sometimes it is twice a week, I mean two weeks.

Q. Now, do your duties of the Chattanooga and Huntsville Divisions include the supervision of the Cravens Yard?

A. Yes sir.

Q. And the yardmaster, master mechanic and trainmaster in that yard are under your supervision?

A. Yes sir.

Q. And the chief clerk for the yardmaster is under your supervision?

A. Yes sir.

Q. Now, do you have a copy of the instructions that were given to you back in 1941 to pay these persons who were posting at least forty cents an hour or whatever the minimum wage under the Fair Labor Standards Act was?

A. I couldn't say whether I have or not.

Q. Do you recall whether you received written or oral instructions?

A. I received instructions, I am sure. I know we discussed it once or twice orally with the Assistant General Manager at that time, acting General Manager now, what those men would be paid.

Q. Now, how far is the Cravens Yard from your office?

A. It is a little more than a mile.

Q. And do you have occasion to be in the Cravens Yard often from time to time and see who is working there?

A. When I am out and go into the office. Sometimes I go out there and don't go into the office.

Q. You know a lot of people by their first name, I imagine?

A. Yes.

Q. And I have no doubt but what you would know if a

stranger were working in one of those offices, wouldn't you?

A. Well, yes sir, I would guess I would notice any stranger.

Q. Don't you ever recall during that period seeing a new man working there and inquiring about him?

A. I don't recall; I might have.

Q. Don't you recall ever during that period having it called to your attention one way or another, as superintendent of the Chattanooga and Huntsville Divisions, that there were people posting in the office at Cravens Yard?

A. I knew that from talking with the chief clerk, Born, that he had men posting and learning jobs out there; I knew that.

Q. And didn't you know, as superintendent of those divisions, that those men were not being paid for that posting?

A. No sir.

Q. Didn't you have occasion to check the payrolls?

A. No sir, I don't check them.

Q. How is it then that you send in the payrolls on these cubs to the department, auditing department, for payment?

A. When it was brought to my attention that they had not been paid we instructed the heads of the departments to prepare that list of men and submit to me and that list is submitted, and I had to sign it, o. k. it and send it in, but I don't check the payrolls.

Q. Now, Mr. Tucker, have you seen this list of names which has been filed as Plaintiff's Exhibit No. 7?

A. No, I haven't seen this.

Q. Just look over the list. (Handing paper to the witness.) Do you know any of the men on it?

A. No, I don't.

Q. You do not?

A. No sir.

Q. In connection with your men on the road you have certain rules and regulations that your men must follow, don't you?

A. Roadmen?

Q. Yes sir.

A. Yes sir.

Q. And men in the switching service also?

A. Yes sir.

Q. And do you have rules and regulations that you require your office help, that is, your chief clerks to follow?

A. Yes sir.

Q. Now, suppose a man on the road is found to have violated some of the rules, do you discipline him?

A. We hold an investigation and after holding an investigation, if we find he has violated a rule, we take disciplinary action.

Q. What would that disciplinary action be?

A. It would be a record suspension, or, if it was a pretty bad case, it might mean removing him from the service.

Q. For example, a man that had been engaged in a fight might be removed from the service?

A. Yes sir.

Q. But a man who violated a rule that required him to travel ten miles an hour across a bridge and he traveled, instead, eighteen or twenty miles an hour, he might get a few days suspension?

A. Well, he might and he might not.

Q. Well, if you found him guilty of violating that rule?

A. Yes sir.

Q. You would suspend him for a couple of days?

A. No, not suspend him—issue—it is a record suspension.

Q. You take him out of the service?

A. It is a book suspension that we issue against his record, so many days record suspension. If it was just ten, it would be ten days record suspension.

Q. Now, suppose a chief clerk violates one of your rules and regulations, do you discipline him in the same way?

A. Never have, no sir.

Q. You never have?

A. No.

Q. No matter how serious it is?

A. Well, I haven't had any that was so very serious.

Q. You haven't had any that was so very serious?

A. Nothing but what a verbal reprimand would do as well.

Q. Now, in the case of Mr. Born, did you discipline him in any way for this violation of instructions?

A. No sir, but I have reprimanded him.

Q. You didn't think it was very serious?

A. There are several things to consider whenever it comes to discipline. During this war period it is very hard to get men. Mr. Born is a very efficient chief clerk in many respects and I didn't feel that I should remove him from the service but I did reprimand him verbally.

Q. As an efficient chief clerk you mean he is able to handle things in the office pretty well?

A. Yes sir.

Q. He is thoroughly familiar with all of your rules, regulations, instructions, etc.?

A. Yes sir.

Q. Except the one regarding the Wage and Hour Law, is that right?

A. That is right. He made a mistake there.

Q. Well, you mean to say, Mr. Tucker, that during all these years when that entire list of men were down there cubbing or posting without pay that never, during all that time, was called to your attention?

A. It was not.

Q. Did you hold an investigation on Mr. Born?

A. About his failure to do this?

Q. Yes sir.

A. I did not.

Q. You didn't even have an investigation?

A. No.

Q. The ordinary investigation with reference to men on the road is an investigation that is made in writing; isn't it?

A. With Mr. Born I didn't think it necessary to do that and I thought the action I had taken would prevent a recurrence and that is usually what discipline is for.

Q. So the only thing you did was to talk to him about it and give him a reprimand?

A. Yes sir.

Q. You didn't discipline him for any length of time?

A. No.

Q. Now, Mr. Tucker, how is it that you have waited until now to notify these employees by letter that they had this money coming?

A. I didn't know that these checks had not been delivered until I came down to Nashville to this hearing. I was told yesterday or the day before and that was the first knowledge I had of it.

Q. You didn't check at any time to see whether or not the checks that you had requested to be delivered had actually been delivered?

A. I never do.

Q. Now, all of this with reference to the payment of these office employees has all been done since this suit was started, hasn't it?

A. Yes sir.

Q. Do you have any written instructions with regard to the payment of these employees?

A. When the suit was filed I immediately notified counsel and the acting General Manager and the acting General Manager immediately wrote me with reference to it to try to have a list prepared for every man that had not been paid and see that they were paid, and I immediately—had had the instructions for some time, I can't say how many days right now before I got the instructions—and then compiled a list of all these employees and tried to arrive at the hours. It was quite a big job.

Q. You heard the testimony of Mr. Porter that he had gone over all this list with Mr. Born that he had down there in October?

A. Yes.

Q. And that Mr. Born had given him the number of of days?

A. Yes sir.

Q. Did you know that the Wage and Hour Department, the Wage and Hour Administrator's representatives were making an investigation in October?

A. No sir. The first I knew of that was sometime after he had been down there. I don't know who he was. And they came to see me—I guess it was him, some man up here and called to see me.

Q. Before the suit was started?

A. Well, I was out of town, just a little while before the suit, and the next I knew that he had been at the yard office making a check was after the suit was filed and then some of them told me there was a man out there making this check and I don't think they ever realized what he was checking for.

Further this witness saith not.

The next witness, M. O. ARMSTRONG, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Whitwell:

Q. Where do you live, please sir?

A. Nashville.

Q. What position do you hold with the NC&StL Railway?

A. I am superintendent of the Nashville and P&M Divisions.

Q. How long have you been superintendent of the Nashville and P&M Divisions?

A. Approximately eight years.

Q. Mr. Armstrong, I will ask you if you heard the testimony of Mr. McWhorter on Wednesday when he testified that back sometime about 1940 he issued instructions to the various superintendents to pay persons who posted for positions of porter, caller, messenger, stenographer or clerk an amount equal to the minimum provided by the Wage and Hour Law and to keep record of the time, days and hours so spent while posting?

A. I did.

Q. Did he give you such instructions at that time and did you understand them?

A. He did, and I understood them, yes sir.

By the Court:

Q. When was that?

A. I think it was about 1941, somewhere along there.

By Mr. Whitwell:

Q. Now, between that time and 1938, this period just before the war, were there people posting or being employed for these positions or for trainmen's positions?

A. No, I don't think so. I don't have any record of it. If there was it was very few.

Q. Now, when you got those instructions, Mr. Armstrong, did you relay them to the different subordinates who had something to do with receiving applications for posters?

A. I did.

Q. Have those instructions that you received and that you relayed in reference to posters been carried out on the Nashville and P&M Divisions currently, so far as you know?

A. They have.

Q. Do you know at this time or have you known at any time of any person who has posted during the effective period of this Act who was not paid for his period of posting?

A. I don't know of any case. I know there has a lot been paid and I don't know of a single case where we failed to pay for posting.

Q. Do you understand that it is the present practice of the management to pay all persons for their period of posting in accordance with the minimum wage provided by the Fair Labor Standards Act, and also to keep record of the days and hours posted?

A. I do.

Q. Now, you heard Mr. McWhorter testify in reference to adopting the policy of paying $5.00 a day to persons cubbing for positions of firemen, switchmen and brakemen, which policy was adopted, effective December 1st, 1943. Did you get instructions to that effect back at that time?

A. I did.

Q. Did you hear his testimony to the effect that it was adopted as the result of recommendations of a national committee as an inducement or incentive payment?

A. I did.

Q. Have you ever considered that $5.00 a day as wages or is it an incentive payment?

A. We have always considered it as an incentive and not wages.

Q. Since you have been connected with the Railroad and certainly since you have been superintendent of these two divisions has the Company ever considered any person an employee during the period of his posting—I mean of his cubbing?

A. They have not.

Q. Do the people in the office who have charge of receiving these applications, do they have instructions to advise all applicants at the time that they must undergo a training period and certain other routine that has already been explained here before they will be accepted for employment and go on the roster as employees?

A. They have.

Q. Now, are the practices in the cases, as referred to, brakemen, switchmen and firemen, all alike with the exception that the things that a fireman has got to learn are necessarily different from the things that a person has got to learn to become a brakeman?

A. I don't understand that question.

Q. Are these routine requirements such as cubbing, filing an application, taking an examination, physical examination and taking these written examinations, is the practice in reference to brakemen and switchmen practically identical to that of firemen?

A. They are, yes sir.

Q. Now, sometime after December 1st, 1943, did the management of the Railroad change its policy in reference to payment of this $5.00 a day and give instructions that in the future persons would be paid $5.00 a day during the period of their cubbing, provided they completed their cubbing or didn't voluntarily quit before qualifying?

A. That was the instructions, yes sir.

By the Court:

Q. Now, when was that last instruction put into effect?

A. I believe about the 15th of December. I am not sure —somewhere along there.

Q. 1944?

A. 1943.

By Mr. Whitwell:

Q. In other words, the policy that you now speak of followed the other policy about two weeks?

A. That is right.

Q. Now, persons who might have applied for positions in train service between December 1st, 1943, and December 15th, or thereabouts, 1943, would be told by the person handling that that they would be paid $5.00 a day?

A. Naturally they would, yes.

Q. Now, thereafter, beginning about December 15, 1943, were those people, when they made their applications, told at the time that if they didn't complete their cubbing they wouldn't be paid $5.00 a day?

A. That was the instructions that we gave to the ones that were in charge of accepting application. My understanding is that is what was told them. Of course, that was handled by the clerk in the trainmaster's office.

Q. And so far as you know, those people who handled these applications did follow instructions which you gave them?

A. That is right.

By the Court:

Q. Well, have you ever changed that last policy and returned to the policy of paying $5.00 a day regardless of whether they finished or not?

A. We have a later letter.

Q. When was that letter, about?

A. I believe January 1st or 2nd of this year.

By Mr. Whitwell:

Q. Now, Mr. Armstrong, those people who applied during the period prior to those last instructions January 1st, or thereabouts, 1945, and pursuant to the instructions of December 15th, or whatever the date was, and back to December 1st, were their names currently turned in to the accounting department on time slips or time cards or whatever you call them, showing the days of cubbing and the name of the person and the period of cubbing, were those

turned in in all cases except those who were known to have quit cubbing before the list was turned in?

A. I don't believe I understand that question.

Q. What I was really asking you: pursuant to those prior instructions was the accounting department furnished with the names of those who cubbed during that period and the time of their cubbing unless it be some person that you happened to know had already quit cubbing?

A. Time tickets were turned in by the men that were posting and they were turned into the timekeeper or the auditor. They turned that in.

Q. Were those people currently paid for the time turned in?

A. They were.

Q. Now, after the General Manager's office adopted the policy of going back and paying persons who had cubbed, even though they quit, for the days which they cubbed, did you furnish the accounting department a list of those names?

A. We furnished them to the accounting department for both firemen—I mean student firemen and student brakemen.

Q. Do you know whether or not the accounting department has entered those upon its payroll record, or whatever they call it, and issued vouchers for those?

A. My understanding is, it has; I don't know.

Q. Did you hear Mr. McWhorter's statement that he concluded to go back and pay those persons for the cubbing, the days that they cubbed, even though they quit, because it had been brought to his attention that several of them had understood at the time of their applications that they would be paid $5.00 a day regardless?

A. I heard that statement, yes.

Q. Mr. Armstrong, you heard the testimony of Mr. Tucker in reference to the reasons for cubbing, why it was necessary and why it is required and all those things. Do you adopt his explanation in reference to that?

A. I do.

Q. Have you cubbed any men on your divisions longer

than was considered absolutely necessary to teach them the duties of the positions they sought?

A. I have not.

Q. Has this cubbing practice for these positions been absolutely in good faith at all times on the part of the Company?

A. It has.

Cross-Examination,

By Mr. Jansen:

Q. Just one or two questions, Mr. Armstrong. Do I understand that the people who take the applications now have instructions to tell these men that they will get $5.00 a day for cubbing, regardless?

A. Yes, sir.

Q. Will you give me a copy of that letter? I asked you to produce that with a subpoena, didn't I?

A. I don't know whether we have such a letter or not. If we have—

Q. You spoke of a letter on your direct examination. You said you got a letter about this new policy, didn't you?

A. I don't remember.

Q. Well, you did get a letter about it?

A. We either got a letter orally.

Q. Well, which was it? Have you looked for a letter?

A. No.

Q. But you got the subpoena, didn't you?

A. Yes sir.

Q. And it was the subpoena which asked you to bring all written documents in connection with the instructions as to payment for cubbing, didn't it?

A. The letter was addressed to the NC&StL Railway and my understanding was that that applied to the General Manager's office.

Q. Well, the subpoena was addressed to the NC&StL Railway and to you and to Mr. Shannon?

A. I understood that those—

Mr. Jansen: Counsel, do you have those written instructions?

Mr. Hunt: May it please the Court, I think we should clear this up. Now, there was a subpoena duces tecum for three hundred records addressed to the Railway and Mr. Armstrong, and in addition, to bring copy of letters as to these instructions. The General Manager was going to be here and Mr. Armstrong also and we told the General Manager to bring that letter that he wrote to Mr. Armstrong. Now, there is a letter of December 15th that you have there.

The Court: Wait a minute. All we are trying to do now is to get the facts and I want counsel to proceed with the examination on the facts. If there is any question of whether anybody has avoided a subpoena you can bring that to my attention in the usual way and I will handle it but in the meantime we will get on with the facts.

By Mr. Jansen:

Q. Well, do you have any memoranda with regard to these new instructions which you say are now in force? Do you have anything written about that?

A. I don't know. I probably have.

Q. Now, Mr. Armstrong, there are one or two other questions. If a man is an engineer on your railroad running between Nashville and Bruceton, a regular man on the payroll, and he has been making that run for two or three years and you wanted him to run or he wants to run between Nashville and Chattanooga, you require him to cub that Chattanooga part of the railroad before he gets on regular, don't you?

A. I don't understand that. Repeat that, please.

Q. If you have a regular employee, an engineer, who has been running between Nashville and Bruceton and you are going to start him running between Nashville and Chattanooga and he has never run between Nashville and Chattanooga before, you require him to cub Nashville to Chattanooga before he goes on the regular run, don't you?

A. I would think Mr. Tucker would, yes sir. I would think that would be the thing to do.

Q. And he cubs that without compensation, doesn't he?

A. Really I don't know what the contract is. The contract provides for that, with the engineers.

Q. You don't know?

A. That is right.

Q. Suppose a man—what part of the railroad are you superintendent of?

A. Between Nashville and—I will say to Bruceton.

Q. Let's start the other way then. A man has been running between Nashville and Chattanooga and you are going to put him on between Nashville and Bruceton and he has never run between Nashville and Bruceton before—he is one of your employees and all that—you require him to cub between Nashville and Bruceton?

A. Yes sir.

Q. And he cubs without compensation between Nashville and Bruceton, doesn't he?

A. As I say, the contract provides for that and I really don't know. There is a provision in there. I really don't know. I couldn't tell you off-hand.

Q. It is cubbing that he does? He does cub it?

A. I wouldn't think it would be cubbing. He would be familiarizing himself with road he has not been over.

Q. Don't everybody call it cubbing?

A. I wouldn't call a man we had that had to qualify as an engineer on the seniority district as cubbing.

Q. You mean to say you can't tell us whether you pay him or not for cubbing between Nashville and Bruceton?

A. I couldn't until I had the contract.

Q. How long is he required to cub between Nashville and Bruceton after he has been running on the Chattanooga Division?

A. Oh, I would say one trip.

Q. One round trip.

A. I think that would be right. The only thing he would have to do would be to familiarize himself with the new tracks or anything that had been built since the time he was over there. He would be familiar with a lot of the road.

Q. And the same is true of a fireman?

A. No.

Q. You wouldn't ask a fireman to cub?

A. No, that would be only for the engineer.

Q. Because he has got to run the engine and he has to know the division, is that right?

A. And I don't know that we do that.

Q. How about the conductor?

A. We never require that.

Q. Do you have anything to do with—you have charge of the conductors, too, don't you?

A. Yes sir.

Redirect Examination,

By Mr. Whitwell:

Q. Mr. Armstrong, isn't it true that the Nashville Division and the Chattanooga Division are both one seniority district?

A. That is right.

Q. And when a person applies for the position of fireman or brakeman in road service he cubs the Nashville Division and the Chattanooga Division?

A. That is right.

Q. Because it is one seniority district?

A. That is right.

Q. And now if a man has worked for ten years on the Chattanooga Division, after having qualified and become an employee, if the Company requires him to make a run on the other division, over which he has already cubbed and held seniority rights, you think for that run there is some provision in the contract between the organization and the Railway that governs that?

A. That is right.

Q. Then that relationship has nothing on earth to do with cubbing, does it?

A. I don't think so.

Further this witness saith not.

Testimony of William Shannon

The next witness, WILLIAM SHANNON, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Whitwell:

Q. What are your initials?

A. My name is William Shannon.

Q. Where do you live?

A. Nashville.

Q. How old are you?

A. Fifty-eight.

Q. What position do you hold with the NC&StL Railway?

A. Chief clerk in the trainmaster's office of the Nashville and Paducah & Memphis Divisions.

Q. How long have you held that position?

A. Well, I came there January 1st, 1940.

Q. What position did you hold with the Company immediately prior to that?

A. Chief clerk to the superintendent of the Huntsville Division.

Q. Mr. Shannon, as chief clerk to the trainmaster of the Nashville and P&M Divisions, do you have anything to do in connection with persons making application for positions of firemen or brakemen?

A. I do with brakemen.

Q. Now, are the applications for positions as firemen handled through the master mechanic's office?

A. I understand they are.

Q. And you say you have been more or less in charge of that since January, 1940?

A. I think so, yes sir.

Q. Now, prior to December 1st, 1943, when a person came to your office and made application for position of brakeman was he told by you at the time that he would have to undergo a physical examination and a cubbing period?

A. Yes sir.

Q. Was he also told that he would have to stand a written and an oral examination before he could qualify for the position applied for?

A. That is right.

Q. Now, prior to December 1st, 1943, was he told at the time that he would not be paid anything during the period of his cubbing?

A. Yes sir, he was.

Q. Now, those general things that you have spoken of, are they true since December 1st, 1943, with the exception of the change in policy as to compensation?

A. That is the only change.

Q. Now, about December 1st or the latter part of November, 1943, were you instructed by the superintendent, Mr. Armstrong, that the Company would pay persons while cubbing $5.00 a day?

A. Yes sir.

Q. And was that policy modified or changed in some way along about the middle of December, 1943?

A. Yes sir.

Q. Now, between the date of December 1st, 1943, and the middle of December persons who may have applied for those positions, were they told then that they would be paid $5.00 a day?

A. They were told that they would be paid $5.00 a day.

Q. Now, I believe it appears that Mr. J. B. Allen testified yesterday that he cubbed between those dates.

A. I think so. He did, yes sir.

Q. If he did, he was told, as he says, that he would be paid $5.00 a day?

A. That is right.

Q. Now, about the middle of December, 1943, what instructions did you get from the superintendent in reference to persons who applied and began their cubbing period and quit before completing it?

A. We were instructed they wouldn't be. They would be paid $5.00 a day, provided they completed their training.

Q. But if they didn't complete their training they wouldn't be paid, is that right?

A. They wouldn't be paid unless they cubbed through a regular pay day and got paid. We didn't hold back anything to see if they were going to complete it.

Q. In other words, if I understand you, if a man cubbed

through a regular pay day, why, he would be paid, even though he had quit and you didn't know about it?

A. That is right.

Q. But if you knew about it he wouldn't be paid?

A. We would stop it, yes sir.

Q. Now, during that period were those things told to the persons who made applications and told at the time?

A. Yes sir.

Q. Now, beginning about January, 1945, did you get instructions from Superintendent Armstrong that persons who cubbed for positions of brakemen would be paid $5.00 a day?

A. Yes sir.

Q. In other words, that instruction was identical with the very first instruction, wasn't it?

A. Yes sir.

Q. And since that time have persons who made application been told that they would be paid $5.00 a day?

A. Would be paid $5.00 a day.

By the Court:

Q. Now then, how long did this policy remain in effect insofar as paying them for the posting or not paying them if they quit during that period?

A. Well, that would be from about December 15th, 1943, until about January 1st, 1944.

Q. 1944 or 1945?

A. 1945.

Q. A little more than a year?

A. Yes sir, a little more than a year.

The Court: All right.

By Mr. Whitwell:

Q. Now, Mr. Shannon, is it your understanding that the same instructions went out in reference to persons applying for positions of firemen and switchmen?

A. I understand it was the same.

Q. And switchmen?

A. Yes sir.

Q. Now, after this policy was changed in January, 1945, and made the same as it was in December, 1943, or Decem-

ber 1st, 1943, did the superintendent's office furnish to the accounting department a list of the names of persons who had cubbed but who were known to have quit their cubbing before they completed it or before they finished their examination and qualified, and give along to the accounting department with the name of that person the period of his cubbing?

A. I understand they did, furnished by the superintendent's office.

Q. You understand that there will be witnesses here?

A. I do.

Q. So far as you know, have those names all been turned in who had not been covered or already paid under prior instructions?

A. So far as I know.

Q. And you understand that they are to be paid if vouchers are not already issued?

A. That is right. In most cases they have already been issued.

Q. Now, Mr. Shannon, you have heard the testimony of Mr. Tucker and Mr. Armstrong in reference to the necessity of a person undergoing a training period or cubbing and these different preliminary or re-employment conditions, and to shorten this testimony, do you adopt Mr. Tucker's statement in reference to that?

A. I do.

Q. I do want to ask you two or three questions about this so-called schedule that is handed a man who has filed application and taken his physical and is ready to begin cubbing. I believe such cub is handed a schedule of trips, whether he be cubbing for the position of brakeman or fireman; is that your understanding?

A. That is my understanding, he is. A brakeman is. If he is cubbing for brakeman he is.

Q. You know a brakeman is. Does that statement read, just above the list of schedules suggested to him, this: "It is desired that you cub—"

Mr. Jansen: Just a minute. I think the schedule is the best evidence and I object.

The Court: There is one of them already in evidence. I looked at it yesterday.

Mr. Whitwell: I overlooked that and I shouldn't have asked this question. There is that statement. I believe that is the way it is.

Q. Now, Mr. Shannon, tell us briefly why it is desired that a person cubbing be given a schedule to follow.

A. Well, first, it is for his convenience in getting with the proper crew and to know where and when to find that crew. It is not considered that they have time to look after more than one and it is hazardous for them to do so. For that reason we separate them. And another reason that I have had in mind is, I have had occasion to use that to keep up with where the cub is, in case he has sickness at home and his people call and want us to notify him. Well, if I don't know what crew he is with, he is practically lost.

Q. Well, also, I will ask you if it is not true that that schedule set out is arranged as to make it possible or to make it certain that he will familiarize himself with all parts of the line over which he will be required to work after he becomes an employee?

A. It is.

Q. Now, is he required to literally follow that schedule or may he cut some runs out and still ride some and miss some?

A. He can miss them.

Q. Does that frequently happen?

A. I will say that generally happens that he will miss some during the period.

Q. If he does not follow that schedule and maybe cubs one day and lays off four, is he still permitted to go ahead and cub, if he wants to?

A. He is.

Q. Mr. Shannon, were you in the courtroom yesterday when a man by the name of R. T. Justice testified?

A. I was.

Q. Did you hear him say he had cubbed sixteen days and took a physical, making seventeen days, and had been paid only $30.00?

A. Yes sir, that is my recollection of his statement.

Q. Did you hear him say that he was promised $5.00 for the day that he took his physical examination and that the Company wouldn't pay him?

A. I understood him to say that he had not been paid.

Q. Do you have a cancelled check made payable to him covering that day?

Mr. Jansen: If the Court please, that wasn't the testimony of Mr. Justice. He testified that he had not been paid for the dead-heading and the Martin turn-around, and I object to counsel misstating the testimony.

Mr. Whitwell: Mr. Justice said he got—

The Court: Proceed. I heard the testimony and you need not argue about that. Go ahead. What is it you want to say about it?

By Mr. Whitwell:

Q. You have with you check showing payment of the base sum of $5.00 to Mr. Justice, R. T. Justice, dated June 15, 1944?

A. I do.

Q. Now, do you have another check here showing payment of $35.00 to Mr. Justice, voucher dated July 11th, 1944? That is for $35.00 minus deductions.

A. I do.

Q. Now, Mr. Shannon, I hand you the record of Mr. Justice here and want to ask you just a few questions about it.

By the Court:

Q. What do these checks aggregate there?

A. $5.00 and $35.00.

Q. $40.00?

A. $40.00.

By Mr. Whitwell:

Q. Now, Mr. Justice claimed that he cubbed sixteen days. I wish you would refer to that record and tell us what days he did cub.

A. The number of days?

Q. The number of days that he cubbed.

A. He cubbed thirteen days that would come under the agreement with us to pay him $5.00 for.

Q. I want to ask you about these other three days. Did he turn in a time ticket for June 20th, 1944?

A. Yes sir, he did.

Q. What was he doing that day? What does the time ticket show?

A. He showed he was dead-heading from Nashville to Bruceton.

Q. Dead-heading. Have you ever considered dead-heading cubbing?

A. No sir.

Q. Is that the reason that he wasn't paid for June 20th, he was dead-heading and not cubbing?

A. That is right.

Q. Now, what did he turn in in reference to June 21st, 1944?

A. He turned in two days on June 21st. He turned in two days. Do you want to know what they were for?

Q. Yes sir, tell us what they were for.

A. One was trip Bruceton to Martin and return, on freight train, and the other one was trip from Bruceton to Nashville made later the same day.

Q. In other words, he made two trips in one day and turned in two days' cubbing for one day's cubbing, is that right?

A. That is right.

Q. Is that the reason you didn't pay him $10.00 for that day instead of $5.00?

A. I didn't have any instructions to pay him for but one $5.00.

Q. This $5.00 incentive payment you speak of, it was not a payment of $5.00 a trip, it was $5.00 a day while cubbing, wasn't it?

A. A calendar day.

Q. Now, what is the situation as to June 23rd, 1944?

A. June 23rd he turned in two days.

Q. Is that the same situation as existed with reference to June 21st?

A. Yes sir.

Q. So he actually cubbed thirteen days and not sixteen, is that right?

A. That is right.

Q. He has actually been paid $40.00 and not $30.00?

A. That is right.

Q. And did he ever qualify by completing his cubbing and taking his examinations, oral and written?

A. No sir.

Q. Was he notified, as shown by that file, that he would have to complete his examination?

A. I notified him, as shown by the file there, that he hadn't completed it.

Q. And did he ever complete it?

A. No sir.

Q. So there are, according to the record, six days for which he has not been paid for cubbing unless paid recently?

A. That is right.

Q. And that $30.00 wasn't paid at the time because he had not completed his cubbing?

A. He didn't complete his training.

Q. Now, under this January, 1945 policy has his name gone on the roll of those who are to be paid regardless of whether they finished or not?

A. It has.

Q. Have you had occasion to look at the record and see whether or not a voucher has been issued to him for $30.00?

A. I have.

By the Court:

Q. Well, has it?

A. It has.

The Court: I think that about winds that up, don't it?

Mr. Whitwell: Yes sir. Now, I want to ask just a few questions as to Mr. Bugg.

The Court: Before you do that we will take a ten minutes recess.

(Recess).

By Mr. Whitwell:

Q. Mr. Shannon, I just wanted to ask you two or three questions about Mr. E. W. Bugg, who testified yesterday. How many days, according to the record, did Mr. Bugg cub?

A. This file shows that he cubbed a total of ten days, it seems.

Q. Now, was there any objection to that one day that covered the physical examination?

A. There was not.

Q. Was part of that cubbing the latter part of June, three days in June, and one day for the physical—was voucher issued? I am talking about September 27th. Was that the date of his physical?

A. The date of his physical—let's see—I think it was—I think that was the first day he cubbed. The date of his physical was September 22nd (Referring to file). September 27th was the first day he cubbed.

Q. Now, was he paid, the first voucher for $20.00, for four days in September, 1944?

A. Yes, sir.

Q. Now, the balance of his cubbing was the early part of October, 1944, which would be on another payroll date?

A. Another payroll.

Q. And he got $20.00 for his cubbing during the September period?

A. Yes, sir.

Q. Now, was a check in the amount of $35.00 issued to him covering his cubbing in the October period?

A. I understand it was, yes sir.

Q. Issued at that time?

A. At that time.

Q. And under the practice that if a man didn't complete his cubbing he wouldn't be paid, it is your understanding that that check was not delivered to him?

A. That is right.

Q. It is also your understanding that under the policy adopted this year, the early part of the year, that those people who cubbed and quit and had not been paid for the days cubbed, that voucher is being issued or has been issued to cover that entire period?

A. That is right.

Q. Making payment of $35.00, plus the first voucher for $20.00, or a total of $55.00?

A. That is right.

Q. Now, does that same situation obtain with reference to Mr. Allen, J. B. Allen?

A. Yes, sir.

Q. He didn't complete his cubbing and at the time he didn't receive pay for cubbing?

A. That is right.

Q. But he is included in this pick-up list that we have been talking about?

A. Yes sir.

Cross Examination,

By Mr. Jansen:

Q. For whom are you chief clerk?

A. The trainmaster of the Nashville Division and the Paducah & Memphis Division.

Q. Now, these instructions that you received around January 1st of this year with regard to paying everybody, whether they completed their cubbing or not, were they in writing?

A. Well, I don't know whether they were in writing or not. The office is right adjoining the superintendent's office.

Q. Well, tell me this, Mr. Shannon: most all instructions on the Railroad with regard to things of that kind, instructions with regard to hiring and firing and all of that, are generally in writing, aren't they?

A. Well, we don't get many instructions in regard to hiring and firing. That wouldn't apply to me.

Q. Well, memoranda that relate to different things that you might have to do in connection with the operations of your particular office are generally received in writing, aren't they?

A. Well, they may be confirmed in writing but instructions, as they come out, I usually get them—I get them verbally.

Q. And you also get written instructions?

A. Yes sir.

Q. Now, you don't recall whether you got written in-

structions about any of this paying business in connection with cubs at all, is that right?

A. Well, I think I got the first letter probably in writing.

Q. That is the one dated in December, 1943?

A. Yes sir.

Q. But all the subsequent things you don't recall getting?

A. I wouldn't say about that.

Q. How long does it take to get instructions from Nashville to Chattanooga?

A. To get instructions?

Q. Yes sir. Do you know anything about that? When they have instructions for the Chattanooga Division do they send them from Nashville to Chattanooga?

A. I presume they do. That would go through some other department.

Q. And is that generally in writing—do you know?

A. I wouldn't know.

Q. Did you have some discussion with Mr. Justice about not getting his cubbing pay for the dead-heading and the Martin turn-around?

A. He testified yesterday that I did. We have had so many cubs that I wouldn't say just what was said but I remember some discussion about it.

Q. Now, whether he received $30.00 or $40.00, his complaint was that he had not been paid for the dead-heading and that Martin turn-around, that is right?

A. That is right.

Q. And the dead-heading, was that on a day when he had had another run?

A. No sir. This is not the file.

Q. Will you refer to that for me, please? (Handing file to the witness).

(Witness hands a ticket to counsel)

Q. What is there on this ticket that indicates it was dead-heading, the d. h.?

A. Yes sir.

Q. And he dead-headed from where?

A. From Nashville to Bruceton.

Q. Do you have any idea why he dead-headed?

A. He went with the crew, I presume.

Q. With the crew?

A. Yes sir.

Q. Now, what does dead-heading mean?

A. It just means more than likely their caboose is attached to another freight train and they just rode down there.

Q. Do you know how long it would take to travel from Nashville to Bruceton dead-heading?

A. Do you want it in this case?

Q. Yes sir.

A. Four hours and forty-five minutes.

Q. Now, this Martin turn-around, turn to that, will you, please?

(Witness looks for record.)

A. You see, the day he made the Martin turn-around, we might have paid him for that day and didn't pay him for the other one.

Q. You mean you might have paid him for the Martin turn-around and not paid him for the local?

A. It wasn't a local. It was a through freight.

Q. Now, that is the only date, June 21st, and that shows Bruceton to Martin, does it?

A. Bruceton to Martin and Martin to Bruceton.

Q. Now, how far is it from Bruceton to Martin?

A. Why, it is in the neighborhood of thirty-seven miles.

Q. Can you tell us in this case how long it took him to make the Martin turn-around?

A. Eight hours and forty minutes.

By the Court:

Q. Now, did he make some other run on the 21st?

A. He made a trip from Bruceton to Nashville.

Q. From Bruceton to Nashville?

A. He started on that, yes sir.

Q. And that was on the 21st?

A. Yes sir.

Q. What do you mean, starting on it?

A. The date of the ticket.

Q. How long did it take him?

A. Five hours and twenty-five minutes.

By Mr. Jansen:

Q. Do you know what train he was on?

A. Train 3/57.

Q. What kind of train is that?

A. Well, I wouldn't know that without looking at the train sheet. Now, it might have been a dead freight or it might have been a perishable freight.

Q. In any event, he made two separate trips?

A. No.

Q. It took some eight hours and on another one it took five hours on that same 21st, didn't it?

A. Yes sir.

Q. You heard his testimony that he claimed that he should have been paid for the Martin turn-around and the dead-heading?

A. Yes.

Q. And you don't recollect any conversation with him at all?

A. I recollect the conversation but I don't recollect what was said.

Q. Now, this schedule that you make out in the case of one employee that we had here yesterday, or one of these cubs, when he didn't finish his schedule you gave him a new schedule to start a certain day?

A. Yes sir.

Q. Is that what you do whenever they miss one of their schedules?

A. Well, if they don't get enough cubbing. Now, when they miss part of the schedule they are supposed, if they go back to cubbing, to go back on the proper date—in other words, not get off on some other train.

Q. Supposed to follow the schedule?

A. Supposed to follow the schedule as far as they do go.

Q. Well, if they miss one or two days that means they won't have enough cubbing and you have to send them back and generally they want to go back?

A. Generally you will add a little bit to the schedule at the end in order to make it for what they miss.

Q. And that schedule is designed so that they cover each branch or each run of the road?

A. That is our intention.

Q. It is also designed so that they cover the work, that is, the runs, the locals?

A. Yes sir.

Q. As much as possible.

A. And especially at first—

Q. And the locals?

A. The locals is what we use primarily.

Q. You don't know anything about the firemen, I take it?

A. No.

Q. That is under the supervision of the master mechanic?

A. I understand it is, yes sir.

Q. And with reference to most of the cubs, brakeman jobs, you give them the same general schedule but it may vary as to trains?

A. Approximately the same, yes sir.

Q. You make out the schedule generally the same for each one?

A. Yes sir.

Q. Do you have anything to do with making the details of the income tax withholding return?

A. No, that is made by the accounting department.

Q. You don't know when this Exhibit 6 was made out?

A. No sir.

Q. You do know that Mr. Bugg didn't get the $35.00?

A. I know that he didn't get the $35.00, yes sir.

Q. And all he got was $20.00?

A. And that he can get the $35.00.

Redirect Examination,

By Mr. Whitwell:

Q. Just two or three questions. Mr. Shannon, with reference to Mr. Justice, about whom you have been questioned, the day that he took his physical examination and for which he was paid $5.00, did he do anything that day except take the physical?

A. No sir, not toward his training.

Q. Now, turn to the first day he worked and tell me how many hours he worked that first day, I mean that he cubbed.

A. Seven hours and twenty minutes.

Q. Now, how many hours did he cub the second day that he cubbed?

A. Six hours and thirty minutes.

By Mr. Jansen:

Q. Where are you getting the time there, those hours there?

A. The time is shown in here, you see.

Q. You start at the bottom, do you?

A. Well, if he completed it like he was told to he would put the time he went on duty and the time off duty. That was what he was instructed to do. He didn't always do that. I put that one in, I believe, from the conductor's ticket. You see, I could take the conductor's ticket and get the same information.

Q. Most of them don't show the number of hours?

A. They all do now.

Q. I mean most of Mr. Justice's?

A. Most of his doesn't. They should have but he just overlooked put it in there.

Q. Will you file that record of Mr. Justice as Exhibit No. 1 to your testimony?

A. Yes sir.

(Papers so filed and marked Defendant's Ex. No. 1—Justice.)

Mr. Whitwell: Under the conditions applicable to the exhibits filed yesterday.

Further this witness saith not.

The next witness, GRADY ADCOCK, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Whitwell:

Q. What position do you hold with the NC&StL Railway?

A. Traveling engineer.

Q. How long have you been traveling engineer?

A. Approximately a year.

Q. As traveling engineer do you have jurisdiction over or supervision over and observe both engineers and firemen?

A. Yes sir.

Q. Now, just briefly without any detail tell the Court generally the duties of a traveling engineer.

A. Well, I o. k. cub firemen, ride with engineers and write up defects on locomotives.

Q. Do you as traveling engineer go along with engineers and firemen and observe their work and make suggestions?

A. That is right.

Q. And check on them and see that they understand their work, and also o. k. cubs who are cubbing for position of fireman?

A. Yes sir.

Q. Now, prior to the time that you became traveling engineer were you an engineer, locomotive engineer?

A. Yes sir.

Q. How long have you been a locomotive engineer?

A. Since I was promoted in 1942.

Q. Now, before you were promoted to engineer in 1942 what job did you have with the Railroad?

A. Firing.

Q. How long were you a regular fireman for the NC&StL Railway?

A. Well, let's see. I came back to work in 1938 and I got a regular job right away after that. I don't know just for how many months but it wasn't but just a few months until I had a regular job.

Q. Now, as fireman have you had persons on your engine from time to time who were cubbing for the position of fireman?

A. Yes sir.

Q. Incidentally, before you became a fireman did you undergo a training or cubbing period?

A. Yes sir.

Q. Were you paid anything during that cubbing period?

A. No sir.

Q. Did you fully understand that you were cubbing for your own benefit and without compensation?

A. That is right.

Q. Now, persons who cubbed with you while you were a fireman, did they have different things that it was necessary for them to know in order to qualify for that position?

A. Yes sir.

Q. Would you undertake to teach them those things?

A. I did that, yes sir.

Q. Did you also do the different jobs that a fireman has to do and have them watch you do those jobs so that they might learn them themselves?

A. Yes sir, the first trip I would let them just observe and talk to them.

Q. Then you would show them?

A. That is right.

Q. And then you would let them do some of the manual activities of the regular fireman?

A. Yes sir, I would let them take it then and I would watch them and talk to them and stand by them.

Q. Now, Mr. Adcock, tell us, more for the record than anything else, some of the duties of a fireman that a cub has to acquaint himself with in order to qualify.

A. Well, he has got to understand the operation of the stoker and on our road we have three different types of stokers, and he has got to familiarize himself with all of them and the hand-fired engines, and all of them have different jets to do the same job but there is some difference in setting the jets.

Q. Well, is there a difference in the hand-fired engines and stoker-fired engines, differences that must be learned by cubs?

A. Yes sir.

Q. Does he have anything to do with the water gauges to keep the proper steam?

A. That is right, know how to carry the water, regulate the feed water pump. He has to know the grades and things like that to be a fireman.

Q. Does he have to learn the road and the different stations, switches and fixed signals along the road?

A. Yes sir.

Q. Does he have to learn the train signals?

A. Yes sir, he picks that up along as he goes. He don't

know it all to begin with, neither does he about firing, but he learns all along.

Q. Now, from your experience and your observation is it necessary that a person undergo this actual training period in order to learn the duties of a fireman?

A. Yes sir.

Q. Now, you have had people cub with you on an engine and I wish you would tell the Court whether or not such things as that person may do in connection with his cubbing, are they of any benefit to the Company during that cubbing period?

A. No sir.

Q. Well, learning to fire a locomotive, is that actually an expense to the Company?

A. Yes sir, I think so.

Q. Does he have any duty or any responsibility in connection with that railroad operation?

A. No sir.

Q. That rests with the regular crew?

A. That is right.

Q. Now, in your experience with persons who cub for position of fireman with you are they required to cub any particular schedule or make any particular trip or do they more or less go at their convenience?

A. Back when I was firing they didn't have any schedule for them. They just would go whenever they wanted to and they still do but I think they kinder have a form they go by now, a schedule.

Q. But you travel up and down the line all the time as traveling engineer, a big part of the time?

A. That is right.

Q. Do you know as a fact that they do more or less select their trips and go at will?

A. Yes sir.

Q. Do you know of occasions when persons would ride a train as a cub for position of fireman and make part of a trip and then hitch-hike back?

A. I have had that to happen, yes sir.

Q. You have had that to actually happen with you?

A. That is right.

Q. You have a certain person in mind, do you?

A. Yes sir, a mighty good fireman now.

Q. And he went ahead—after leaving the train and hitch-hiking back did he come on back later on and complete his cubbing, and you say he made a good fireman?

A. Yes sir.

Q. Mr. Adcock, out of your experience both as fireman under whom persons trained and your experience as an engineer and traveling engineer do you know of any case when you considered that the Railroad Company permitted or insisted upon anybody cubbing too long?

A. No sir.

Q. Now, you go up and down the road every few days. One or two witnesses yesterday emphasized what a cub brakeman does at local stations by way of loading and unloading l. c. l. freight. I want to ask you from your observation and actual knowledge if it is not a fact that there is hardly any l. c. l. freight by rail on any part of the line at this time?

A. Not very much.

Q. And hasn't that been true for seven or eight years, and certainly since highway transportation has made considerable inroads?

A. Yes sir.

Q. Now, at such places as Dickson or Waverly where there is, of course, more l. c. l. freight than at other stations, I will ask you if it is not true that as to those places, or most of them, there is a regular set-out car handling l. c. l. freight?

A. That is right.

Q. Now, as to such places where there is considerable l. c. l. freight, other than at the smaller stations, does the Railroad have regular station employees there who must assist in the loading and unloading of l. c. l. freight?

A. Yes sir, they have station men there at most of the places of any size, you might say, like Dickson and Waverly.

Q. Do you consider that anything that a person does while he is cubbing for the position of fireman speeds up the movement?

A. No sir.

Q. Is there anything that a cub does for the position of

fireman that the regular fireman is not there to do and paid to do?

A. No sir.

Q. Is or not the same thing true as to a person cubbing for the position of brakeman?

A. I am not in as good position to know but I would say so; I would say yes.

Q. Now, Mr. Adcock, I wanted to ask you one question —counsel for plaintiff asked Mr. Armstrong something about a person who has completed his cubbing, say, on the Nashville and the Chattanooga Divisions and who, for a long period of time, we will say, is confined to the operations on the Chattanooga Division, during which time, of course, he holds seniority on both divisions. Now, when he has operated on the Chattanooga Division exclusively for a long period of time and desires to work or is transferred to the Nashville Division, we will say, just what are the circumstances under which he is transferred? There is something about making a trip. I don't understand it. Can you explain that?

A. Well, if he is not familiar with the line of road we furnish a traveling engineer to go along and accompany him on the trip until he is qualified and o. kayed by him that he is familiar enough with the division to handle the job. Is that what you wanted to know?

Q. I wanted to ask you this: if it is not a fact that during that time that he is making that run or runs, whether it is one or three, the Company furnishes a traveling fireman or traveling engineer to go along with him?

A. Yes sir.

Q. Now, during that time is the traveling engineer paid?

A. The traveling engineer is paid a salary.

Q. And during that time is that man paid the regular contractual rate?

A. That is right, just the same.

Q. It has been called to my attention that what you have said is in reference to an engineer?

A. Yes sir, an engineer.

Q. Now, if a fireman is transferred he draws the regular contractual rate, doesn't he?

A. Yes sir.

Cross Examination,

By Mr. Jansen:

Q. You mean to say, Mr. Adcock, that neither an engineer nor a fireman when transferring doesn't have to cub at all in between the time that he goes on the second division?

A. No sir, he doesn't cub any.

Q. Have you ever heard of that in your experience with the Railroad?

A. I don't think I have.

Q. If I should produce an engineer who testified that he had to make a round trip run on the new division and didn't get paid for it would you say that that is not the practice of the Railroad?

A: Well, that is not the practice now.

Q. Do you know that that had been the practice?

A. Well, that has not been the practice for quite a while, for several years.

Q. Well, when did the practice change? You have been with them only since 1942 as traveling engineer, haven't you?

A. No, 1943.

Q. Oh, 1943. So all you know about it, so far as the Company is concerned, is during the time that you were with them as traveling engineer. That is it, isn't it? Is that right?

A. I couldn't say that. I wouldn't say that.

Q. Well, do you know anything about the prior practice of the Company with regard to cubbing engineers when they move from one division to another? You know, as a matter of fact, Mr. Adcock, that it has in the past been the practice of the Company at one time or another to require an engineer to cub, run without pay, when he is transferred from one place to another, don't you?

A. We will say, I won't take any further than I have been traveling engineer. Will that be all right?

Q. I am asking you if you know of your own knowledge, as a matter of fact, that that was the practice of the Company?

A. No, I don't know.

Q. You don't know?

A. No sir.

Q. All you know is what has been the practice since the time you started being traveling engineer, is that right? Is that all you care to testify about?

A. Yes.

Q. How long did you cub?

A. I cubbed—I don't have any record of it.

Q. Oh, approximately?

A. Well, something like a couple of trips each way, a couple of trips to Chattanooga and a couple to Bruceton.

Q. What railroad had you been working for before?

A. Prior to that I never had worked—I worked for the Terminals awhile.

Q. What kind of work?

A. Firing.

Q. Oh, you were a fireman before. When you originally cubbed for fireman how long did you cub?

A. Oh, I didn't cub but about a couple of days, I think.

Q. Do you know? How many days was it?

A. Two.

Q. You were firing for the Terminal first, before you went on the road, is that right?

A. Well, I fired for them something like a month.

Q. At the Terminals?

A. Yes sir.

Q. And then when you went on the road you had to cub for two or three days without pay, is that right?

A. No, I had to cub—well, I said two trips each way. Well, just approximately that.

Q. Without pay?

A. Yes sir, without pay.

Q. And that was after you were working for the Company at the terminal?

A. I didn't get so much experience in the Terminals. They carried me from there to the army in the First World War.

Q. But you did cub after you had worked as a fireman before, is that right?

A. Yes, I cubbed after.

Q. Now, part of your job as traveling engineer is to o. k. cub firemen, isn't it?

A. Yes sir.

Q. And when do you travel with them and o. k. them?

A. Well, when they think they are ready for an o. k. they call for me.

Q. Is that after they have completed the schedule that the Company furnishes?

A. Yes sir.

Q. In most cases they have completed the schedule that the Company furnished before you get in contact with them?

A. That is right.

Q. And you don't know what the Company did about schedules and all of that before you were traveling engineer, do you?

A. Well, I don't think they had any.

Q. You don't think they had any—do you know?

A. They didn't have any back in those days.

Q. Well, did the engineer have to sign any kind of paper for the cub to show that he was or had spent the time with him?

A. I don't know just what year they started that, but I believe it was 1943 when they started paying them and started allowing a cub to sign the trip card.

Q. You really don't know very much about that, do you, Mr. Adcock?

The Court: Well, that sort of proof—I think I can determine that myself.

By Mr. Jansen:

Q. You don't know what kind of schedules they furnished firemen before the year 1943, do you?

A. Well, they just had so many trips, let them cub so many trips on each train.

Q. They did have some sort of schedule that they would cub, so many trips on each train before 1943?

A. On each run, I imagine.

Q. In fact, that has always been the practice of the Company, hasn't it?

A. No, back prior to that they just cubbed just anywhere they would take a notion.

Q. Now, what do you mean when you say the Company doesn't get any benefit from what a cub does?

A. Well, because they have a regular man there to perform this job.

Q. Is that the reason why you think the Company doesn't get any benefit?

A. Yes sir, that is a reason.

Q. The cub does do the fireman's work while the other fireman is watching him?

A. Yes sir.

Q. So the only reason you say the Company doesn't get any benefit is because there is a regular man, as counsel suggested, there who is paid to do the job?

A. Yes sir.

Q. But the fireman himself—the cub might do it and the other man watch; in fact, that is the practice, isn't it?

A. Yes sir, he watches him and instructs him.

Redirect Examination,

By Mr. Whitwell:

Q. This cubbing that you did for position as switchman, that was cubbing in the switching operations and not road cubbing?

A. Yes sir.

Q. Now, when did you do such road cubbing as you did, about when was that?

A. 1922.

Q. Have locomotives been changed, the style been changed since then?

A. Yes sir, a lot. All our engines have been stokered.

Q. And railroad operations more complex?

A. Bought new power.

Q. And railroad operations more complex now than then?

A. Yes sir.

Recross-Examination,

By Mr. Jansen:

Q. I think I misunderstood you. You mean you had worked three or four years for the Terminals?

A. No, just about a month, I think it was.

Q. You mean in 1922?

A. No, I worked back before the first World War. I went from there to the army. When was it over? What year was it over?

Q. 1918.

A. Well, that is the year then I left here.

Q. I still don't understand. You started with the NC&StL Railway in 1938?

A. No, I started in 1922, my first time and then I was cut off about ten years, I guess.

Q. What did you do during those ten years?

A. Farmed.

Q. Then when you came back you started again in 1938?

A. Yes sir.

Q. Now, the first time you were working for the NC&StL were you on road work?

A. Yes sir.

Q. And when you came back in 1938 did you cub again?

A. No.

Q. Not at all?

A. No sir.

Q. Did you come back as traveling engineer or how?

A. Fireman.

Q. Where did you run?

A. I was running over the Nashville and Chattanooga Divisions where I held seniority, both extra.

Further this witness saith not.

The Court: How far, Counsel, are you from the end of your testimony?

Mr. Whitwell: I feel quite sure we are going to get through this afternoon. I have an accounting witness and then I have several, of course, here on cubbing practices and things like that.

The Court: I think you gentlemen have got the picture as to the general practice of cubbing and posting painted with admirably clarity already.

Mr. Whitwell: I won't insist on pursuing it any further, then.

The Court: Judge Davies is going to want this courtroom for criminal trials Monday. I am not shortening at all anybody's opportunity to put their evidence in. I don't want anybody to feel that he hasn't had full opportunity to put in everything he wants to. As I stated a day or two ago, there is no use to keep on going over things that we all know about.

Mr. Whitwell: I was just going to suggest, if it would require a couple more hours in the morning I would be very glad to come in the morning.

The Court: We will recess at this time until 2:00 o'clock.

(Recess for lunch.)

Afternoon Session.

J. B. FAULKNER, the next witness, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Whitwell:

Q. Mr. Faulkner, give your name to the reporter, please sir.

A. J. B. Faulkner.

Q. Where do you live, Mr. Faulkner?

A. Mt. Juliet, Tennessee.

Q. How old are you?

A. Sixty-nine.

Q. Are you employed by the NC&StL Railway?

A. Yes sir.

Q. In what department?

A. Accounting department.

Q. What is your position in the accounting department?

A. Assistant to the Auditor of Disbursement.

Q. How long have you held that position?

A. Fifteen years, approximately.

Q. Now, as assistant to the Auditor of Disbursements are you familiar with the records of the company in that office?

A. Yes sir.

Q. Are those records kept in the regular course of business?

A. Yes sir.

Q. Are they kept according to the rules of the Interstate Commerce Commission?

A. Yes sir.

Q. Are they inspected by persons connected with the Commission?

A. Yes sir.

Q. Now, Mr. Faulkner, I will ask you if you have received from the Superintendent, Mr. Tucker, a list of all persons who have posted for positions of porter, messenger, caller, stenographer and clerks at Chattanooga?

A. Yes sir.

Q. Did that list show the names of the persons and the year and month and the time spent in posting?

A. Yes sir.

Q. Were you instructed by Mr. Tucker's office to take that list of names and enter them upon the payroll records in your office?

A. Yes sir.

Q. And to apply the applicable rate provided in the Fair Labor Standards Act to the periods of posting that were submitted to you in this report from Mr. Tucker?

A. Yes sir.

Q. Were they entered upon the payroll records of your company?

A. Yes sir.

Q. And was the rate that you have spoken of applied to each of those persons and the total amount that those rates figured applied?

A. Yes sir.

Q. Have vouchers issued from your office for the amounts shown covering the periods of posting and the Wage and Hour rate applied to those periods?

A. Yes sir.

Q. Now, from those records did you furnish such a list several days ago that I have here of the names of the persons posting at Chattanooga and the dates of their posting and the amounts of those vouchers that have been issued?

A. Yes sir.

Q. And I believe you say vouchers have issued to all of those persons?

A. Yes sir.

Q. Now, Mr. Faulkner, Mr. S. T. Porter, witness for the plaintiff, testified here yesterday and he filed as exhibit a list of names at Chattanooga or persons who had posted going back, I believe, to 1940. Have you seen a copy of that list of names which was filed by Mr. Porter?

A. I have.

Q. Do you have a copy with you?

A. I have a copy.

Mr. Whitwell: Is there any question that is the copy that you furnished yesterday?

Mr. Jansen: No, no, of course not.

By Mr. Whitwell:

Q. Now, Mr. Faulkner, how many names appear upon the list which Mr. Porter submitted as an exhibit?

A. Eighty-two.

Q. Now, have you taken that list of Mr. Porter's and checked it against the list which you furnished me or my office several days ago to determine how they compare as to the number of names?

A. I have.

Q. How many names of posters at Chattanooga appear upon the list which you prepared from your records several days ago?

A. Eighty.

Q. Now, did you find any names on Mr. Porter's list that do not appear on your list?

A. Yes sir.

Q. How many?

A. Four.

Q. Did you find any names on your list that don't appear on Mr. Porter's list?

A. Yes sir.

Q. But you say there is a difference of only two in number?

A. Yes sir.

Q. Now, I would like for you to file as an exhibit to your testimony the list that you compiled from your records.

A. I will.

(List so filed and marked Ex. No. 2 Defendant Faulkner.)

Q. Mr. Faulkner, have you, as to cubs, prepared a list of all persons who have cubbed on the NC&StL Railway system, as shown upon the payrolls and records of your office since December 1st, 1943?

A. Yes sir.

Q. Have you broken that down by divisions of the Railway?

A. Yes sir.

Q. What is the total number of persons who have cubbed on the NC&StL Railway since December 1st, 1943?

A. Four hundred and seventy five.

Q. Of that total number how many were paid currently, that is, at some payroll date during or immediately following their period of posting?

A. Four hundred and six.

Q. And that leaves how many who were not currently paid?

A. Sixty-nine.

Q. Now, sometime during this year or certainly recently have you received from the various superintendents lists of names of persons who were not paid currently with instructions to enter them upon the payroll and issue vouchers?

A. Yes sir.

Q. Is that the sixty-nine you had reference to?

A. Yes sir.

Q. Have vouchers been issued to those persons or in the process of issuance at this time?

A. They have been issued.

Q. Currently do you receive at your office either from the superintendents or from the person cubbing himself what we call time sheets or time lists showing the period, the days posted?

A. Yes sir.

Q. And are those names, as they come in now, as they exist, appearing on your payroll sheets?

A. Yes sir.

Q. Do you also receive currently time tickets or whatever you call them of persons who may be going through this posting period?

A. Yes sir.

Q. Are they entered?

A. Yes sir.

Q. That time ticket in reference to posting, does that show the date and the number of hours during the day that the posting has been done?

A. Yes sir.

Q. Mr. Faulkner, I must ask you some two or three questions about Mr. E. W. Bugg. There was introduced here in this case an income tax report or some kind of report that your office made to the income tax department showing wages earned during the calendar year 1944 of $55.00. Now, I want you to tell the Court what your records show in reference to the number of vouchers that have been issued to Mr. E. W. Bugg and the amounts of those vouchers and the dates of them.

A. In September, 1944, $20.00 and October, 1944, $35.00.

Q. And are those the vouchers that were shown by your records and from which you made this $55.00 earnings report to the income tax department?

A. It is a carbon copy of the income tax record as made from a carbon copy of these vouchers.

Q. And so you arrive at this figure of $55.00 from carbon copies of two different vouchers that were issued from your office to Mr. Bugg?

A. Yes sir.

Q. Now, when a voucher is issued from your office does your jurisdiction over that voucher cease then?

A. Yes sir.

Q. You don't follow it through and if such voucher were withheld in the paymaster's office or lost or cancelled or anything like that happened to it your office wouldn't know about that?

A. No.

Cross Examination,

By Mr. Jansen:

Q. You don't know whether this voucher for $35.00 has been delivered to Mr. Bugg?

A. No sir, just hearsay only.

Q. And that hearsay is that it has not been delivered, isn't it?

A. Yes sir.

Q. When were these last vouchers issued, the sixty-nine?

A. The sixty-nine, they were issued, some of them two weeks ago.

Q. All of them within the last two weeks?

A. I think I have two here that are in April.

Q. Two in April and otherwise sixty-seven of them within the last two weeks?

A. Yes, in May.

Q. When did you receive your instructions? Who issued them?

A. In the last—during May or last part of April.

Q. You didn't receive any instructions to issue vouchers to these men then back in January?

A. No sir.

By the Court:

Q. Who are they? Is that this group over here in Chattanooga? Are they posters or cubs?

A. Cubs.

Q. Well, is that the group who did not finish their cubbing or were, at any rate, not paid for some part of their cubbing?

A. Yes sir.

Q. But later were ordered to be paid whether they finished their cubbing or not?

A. Yes sir.

Q. That is that group?

A. Yes sir.

By Mr. Jansen:

Q. And those instructions with regard to that group were received within the last ten days?

A. Yes sir.

Q. And not in January. Now, this other list that you offer as part of your testimony, do you have any way of knowing whether vouchers for this last have been delivered to the employees?

A. No sir.

Q. Who checks the returned vouchers after they have been delivered?

A. The Paymaster.

Q. Is that part of your office?

A. No sir.

Q. That is a different office?

A. The Treasurer's department.

By Mr. Whitwell:

Q. Just one or two questions. Mr. Faulkner, this list of those who were not paid currently—I am talking about cubs now, these sixty-nine—for whom vouchers have recently issued, did you get your instructions from the superintendents to issue those vouchers at the time this, we call, pick-up list was sent to your office by the superintendents?

A. It was pick-up men, yes sir.

Q. Well, did you have instructions to enter upon the payroll and issue vouchers for them at the time the lists came in?

A. I don't know. I can't answer that.

Q. All right. Now, about these posters, you say there were eighty of them. Were some of them paid back as far as February, 1945?

A. Fifty-four on the February, 1945 payroll.

Q. And the balance of the list of eighty vouchers have issued more recently, have they?

A. April.

By Mr. Jansen:

Q. You don't mean that they were paid; you mean vouchers were issued for them?

A. Vouchers were issued, yes sir.

Q. Whether they have been delivered or not you don't know?

A. I don't know.

Further this witness saith not.

Testimony of Thomas M. McFarland

The next witness, THOMAS M. McFARLAND, being first duly sworn, testified as follows:

Direct Examination,

By Mr. Whitwell:

Q. Mr. McFarland, what position do you hold with the NC&StL Railway?

A. Locomotive engineer.

Q. How long have you been a locomotive engineer?

A. Since March, 1943.

Q. Prior to that I presume that you were a fireman?

A. Yes sir.

Q. How long were you a fireman before you became a locomotive engineer?

A. From April in 1940 to March, 1943.

Q. Now, Mr. McFarland, before you became a fireman did you undergo a training period?

A. Yes sir.

Q. And that was back in 1940?

A. Yes sir, in February.

Q. Did you make routine application for position as fireman?

A. Yes sir.

Q. You took a physical examination?

A. Yes sir.

Q. Now, when you made your application were you told by the master mechanic's office that you would have to undergo a training period or cubbing period?

A. Yes sir.

Q. Were you told that you would not be paid for that training period?

A. Yes sir.

Q. Do you know, approximately, how many days you cubbed for the position of fireman?

A. Well, I would say a period that consumed between thirty and thirty-five days. That was actual road work, and written tests, too.

Q. Now, did you cub on both the Nashville Division and the Chattanooga Division?

A. Yes sir.

Q. And upon coming employed, did you establish seniority on both divisions?

A. Yes sir.

Q. Now, during the period of your cubbing did you cub with a regular crew?

A. Yes sir.

Q. Did you get instructions from the regular fireman as to the duties of a fireman?

A. Yes sir.

Q. Did you learn also by watching the fireman perform the different duties of a fireman?

A. Yes sir.

Q. You also were permitted to actually perform the manual activities of a regular fireman, that is, those that he performed and has to know about upon becoming an employee?

A. Yes sir.

Q. Now, Mr. McFarland, while you were cubbing for the position of fireman did you perform any service or any manual activities that you considered speeded up the movement or was beneficial in any way to the Railroad?

A. No sir.

Q. Were you doing it for your sole benefit to learn the duties of the job that you had applied for?

A. Yes sir.

Q. Do you consider that you were saving the Company any money during the time that you were cubbing?

A. No sir.

Q. What is your judgment about whether or not, while you were there training and learning to fire a locomotive, that you were probably an expense by way of burning extra coal?

A. I think so. Yes sir, I was an expense.

Q. Do you know of any other way that you could have qualified yourself for the position which you later got except by undergoing this training period?

A. No sir.

Q. Did you consider that, being permitted to perform the actual manual activities connected with it, you better and faster learned the duties of the job that you had applied for?

A. Yes sir.

Q. Did you have any duty or any responsibility whatever in connection with the movement of that train or its operations?

A. No sir.

Q. Were you required to follow any definite schedule in connection with your cubbing?

A. No sir.

Q. Did you understand while you were cubbing that if you cubbed two or three days and wanted to lay off two or three days that you would be permitted to take up your cubbing and go ahead?

A. Yes sir, I did that. I laid off several days.

Q. You did lay off part of the time?

A. Yes, sir, different hours.

Q. That was perfectly all right with the Company?

A. Yes sir.

Q. Now, I believe you said that back at that time no payments were made to persons while cubbing?

A. No payments.

Q. You understood that all the time?

A. Yes sir.

Q. Do you think you got too much cubbing?

A. No sir, I only received the minimum required for the job.

Q. Have you, since you became a regular fireman, had cubs with you on various occasions learning the duties of the job just in the same way you learned them?

A. Yes sir.

Q. And did you consider that persons cubbing with you speeded up your movement or was any benefit to your train?

A. No sir, I do not consider it any benefit.

Cross Examination,

By Mr. Jansen:

Q. You say, Mr. McFarland, that you consider that you received the minimum amount of cubbing necessary to qualify you for a fireman's job?

A. Well, yes sir. A fireman never becomes what we consider perfect. As long as he is here he has trouble.

Q. You consider that the thirty or thirty-five days was the minimum amount of cubbing to qualify you for a fireman's job, is that right? Is that what you said?

A. That is what I said, yes sir.

Q. You heard the testimony of the other firemen here in court, didn't you?

A. Yes sir.

Q. They said that they had been given a schedule which required them to cub thirty-one to thirty-four days?

A. That is right.

Q. You heard that?

A. Yes sir.

Q. You think that is the minimum amount of time that a man would have to cub in order to qualify for fireman, is that right?

A. I would say it was the minimum for everybody. That is what I cubbed. That is what I would consider. When I started cubbing I was one of the first that had been hired since 1929 and they had no procedure and I cubbed until I felt like I could go out with the traveling fireman and be competent to fire the engine all the way on any job that they had.

By the Court:

Q. You cubbed both divisions?

A. Yes sir, both the Nashville and the Chattanooga.

Q. Does that take more time than if you cubbed only on one?

A. Yes sir—no sir—yes sir, because—in a way it would and in a way it would not. The same type of engines and the same engines are used on both divisions.

Q. It took you sometime to familiarize yourself with the road?

A. That is right, sir. Usually I used about one-half of my time on one division and half of my time on the other division.

By Mr. Jansen:

Q. Well, the Nashville and Chattanooga Divisions, do they include the lines from Hickman to Chattanooga?

A. Yes sir.

Q. The same line the brakemen have been testifying about that they had to cub on as brakemen?

A. Yes sir, that is right.

Q. Then the four separate runs that they have talked about, that is, Hickman to Bruceton, Bruceton to Nashville, Nashville to Cowan and Cowan to Chattanooga?

A. No, I didn't cub the locals like they did.

Q. But I mean those four separate places?

A. That is right, four sections of it.

Q. How long did you lay off?

A. Well, my home is in Shelbyville and I would ride out to Wartrace on a freight train as a cub and would get off the engine and go home for the night and probably come back the next day, not but a night. I didn't stay off any lengthy period, just a matter of going home and exchanging clothes and getting some money and coming back.

Q. Getting some money, you mean to pay your expenses with while you were cubbing?

A. Yes sir.

Q. I got the impression from your direct testimony that you didn't follow through thirty or thirty-five days; that you laid off some in there.

A. No, I wasn't at Nashville the whole time; I wasn't ready for duty, that is, to go out any time. I just would get off at Wartrace and go home.

Q. And then catch the train back the next morning?

A. Whenever I got ready to come back I would come back.

Q. They didn't object to that?

A. No sir.

Q. You lay off now, I suppose, when you want to occasionally?

A. Yes sir.

Q. Did the traveling engineer go with you when you had completed your cubbing?

A. Yes sir, traveling fireman, at that time.

Q. Did the traveling fireman check you at any time prior to the expiration of that thirty or thirty-five days?

A. No.

Q. It wasn't until you had finished the thirty or thirty-five days that the traveling fireman checked you?

A. Yes sir. I told him I was ready to go. I felt that I was competent to do the work.

Q. And it was at the end of thirty or thirty-five days when he checked you, is that right?

A. Well, yes sir, it was. At that time I hadn't completed my written but I had completed my road work when he checked me. He checked me merely to see if I was competent to fire an engine.

Q. Oh yes.

A. But I hadn't completed my written at that time.

Q. It was at the end of thirty or thirty-five days, whatever it was?

A. Yes sir, that period.

Redirect Examination,

By Mr. Whitwell:

Q Mr. McFarland, were you told by the traveling fireman at any time during your cubbing period that when you felt that you had had enough cubbing to let him know and he would make a trip with you, anything like that?

A. That is right, sir.

Q. Now, had you had any prior experience with a locomotive when you began this cubbing experience?

A. No sir.

Q. Everything was brand new to you?

A. That is right.

Q. You had to learn the grades and the location of stations, block signals and all of that?

A. Yes sir.

Q. Did you say that you had no experience, theretofore with stoker-fired engines?

A. No experience whatsoever.

Q. Are there different types of stoker-fired engines on the system?

A. Yes sir.

Q. Do they differ in various particulars?

A. Yes sir.

Q. Was it necessary for you to become familiar with those different types?

A. That is right.

Q. Now, is there a single division on the system that is anything like as long in mileage as the combined Nashville and Chattanooga Divisions?

A. No, the other divisions are much shorter. That is, than the Nashville and Chattanooga Divisions combined, they are much shorter.

Q. You were cubbing two divisions and getting seniority on two divisions, weren't you?

A. That is right.

Recross Examination,

By Mr. Jansen:

Q. Do I understand that you didn't want to go on the payroll until the end of thirty or thirty-five days?

A. No, I didn't say that. I wanted to go on the payroll, I mean I wanted to complete my cubbing and then go on the payroll. That was my understanding that when I completed it and a job was available I would be put on the payroll.

Q. Oh.

A. I mean I would be put on the extra board whenever they got ready for me.

Q. Oh, when they got ready for you?

A. That is right. When the amount of work was so that they needed more men, if I was ready, I would be put on the extra board.

Q. That was the reason that it took you thirty or thirty-five days?

A. No, I didn't say that. I said that was the reason I took the thirty or thirty-five days to make myself competent to fire a locomotive.

Q. Do I understand you mean now—I understand that you didn't want to go on the payroll until the end of thirty or thirty-five days, or was there some other reason for it?

A. There was no reason other than I was supposed to learn to fire a locomotive and after I completed my training, completed my training, then if they wanted to put me on the extra board they could do so.

Q. How did you know when you completed your training?

A. I was o.kayed by the traveling fireman for my road work and by the train rule examiner for the written.

Q. And at any time when you were o.kayed by the traveling engineer then you would have completed your training, is that right?

A. No, I took my written after I completed my traveling.

Q. As far as the road work was concerned, any time you would have been o.kayed by the traveling fireman you would have completed your training?

A. That is right, sir.

Q. Then am I to understand you didn't ask the traveling engineer to o. k. you until after thirty days?

A. No sir. The first time I asked him he said "I will go out with you."

Q. Was there any reason for you not asking sooner?

A. Not in particular, no sir. I just wanted to feel I was competent and when I did feel that I was competent I asked him.

Q. If not in particular, was there, in general, some reason for not asking sooner?

A. No reason at all.

Q. Didn't you feel you were competent after about fifteen days?

A. No sir, I did not.

Q. And so you didn't want to go on the payroll at the end of fifteen days?

A. I was told when I completed my cubbing I would.

Q. That is what I am trying to get, Mr. McFarland. You were told that when you completed your cubbing and you knew that you wouldn't complete your cubbing until the end of thirty or thirty-five days?

A. I knew I wouldn't complete my cubbing until I was competent.

Q. Didn't you have a schedule?

A. No sir.

Q. How did you know when the thirty days was up and that it was time for you to have the traveling engineer to check you or the traveling fireman?

A. I felt like I could do my work.

Q. As a matter of fact, you were told that you had covered all the various sections of the divisions in your cubbing, weren't you?

A. No sir.

Q. And still you wanted to work for nothing for thirty days and spend your money until you thought in your own mind you ought to go on the payroll?

A. I wanted to be competent when I was ready—when I thought I was competent; I wanted to be sure in my own mind that I was competent.

Further this witness saith not.

Mr. Whitwell: Call Mr. Hughes.

The Court: What is the nature of this testimony?

Mr. Whitwell: Your Honor, he is a brakeman who has cubbed recently. I have completed all my major testimony and I thought I might put on a short witness or two relating to brakemen but I will be entirely subject to your Honor's wishes in the matter.

The Court: If it is going to be, in general, the same as this other—

Mr. Whitwell: Yes sir.

The Court: And he is going to say: "I am a brakeman and in all respects I did exactly the same thing as these other people and I studied the duties of a brakeman," which we know is coupling and uncoupling cars and riding them around—

Mr. Whitwell: Yes sir.

The Court: Well, do you think it is necessary?

Mr. Whitwell: The only thing I have in mind is this—I am perfectly willing to close my case here.

The Court: This is Friday afternoon and we will have to have the rebuttal and the oral argument. Now, the Court has other engagements tomorrow and if you gentlemen can't finish this afternoon you are going to have to stay over until Monday and finish Monday. I want you

to know that before you take up a lot of time around here you don't think is necessary.

Mr. Whitwell: Your Honor, I believe I will just close my case here. I do have several other witnesses but they will be cumulative.

The Court: All right. Don't let me over-persuade you. I just want to be frank about the whole thing. You want to rest then, Counsel?

Mr. Whitwell: Yes sir, we will rest, your Honor.

The Court: All right, is there any rebuttal?

Mr. Jansen: I have one witness and one other point. One point that I had in mind is a question that perhaps can be cleared up by counsel, and I wanted to ask the General Manager whether or not you had ever applied for a license under Section 14 of the Act.

Mr. Hunt: There is no question about that. Of course, I am not trying to answer specifically but generally, relating to posters, not cubs, involved in this, and not firemen and brakemen, there has been no application for a license.

Mr. Jansen: And then I had one witness I want to ask one question.

PLAINTIFF'S REBUTTAL EVIDENCE.

W. F. SEIGENTHALER, being called in rebuttal and being first duly sworn, testified as follows:

Direct Examination,

By Mr. Jansen:

Q. Your name is W. F. Seigenthaler?
A. Yes sir.
Q. How old are you?
A. Fifty eight.
Q. You live in Nashville?
A. Yes sir.
Q. You are employed by the NC&StL Railway as engineer?
A. Yes sir.

Q. And before that you were employed by them as a fireman?

A. Yes sir.

Q. Now, since you have been on the regular payroll of the NC&StL Railway I want to ask you one question: if you have, in transferring from one division of the railroad to another, been required to cub without compensation?

A. Yes sir.

Q. Tell us about it.

A. I was promoted July 12, 1940, and was on the Chattanooga Division and before I could run on the Nashville Division I was required to cub that division and familiarize myself with any changes that had been made during my absence.

Q. How many trips did you make cubbing?

A. I made two round trips to Bruceton and back and one trip to Martin.

Q. Were you paid for that?

A. No sir.

Cross Examination.

By Mr. Whitwell:

Q. I want to ask you this, Sir: Were you an engineer during that period, at that time?

A. Yes sir.

Q. You were making this run that you speak of or these runs on another division and you were in the class of an engineer at that time?

A. Yes sir.

Q. Now, when you were making those runs were you actually operating the locomotive or just riding the locomotive with the regular engineer?

A. I operated the locomotive except one leg of it, one one hundred miles. In other words, I handled the engine with the engineer standing behind me.

By the Court:

Q. The regular engineer was there?

A. Standing behind me.

Q. You were simply acting in his place in learning the road and the engine?

A. Yes sir, in other words, I was handling the throttle and the airbrake.

Q. When was that?

A. That was in July, 1940 when I was first promoted.

Q. I mean when you were making this cubbing run?

A. I couldn't tell you the exact date.

Q. Well, not the date, just approximately.

A. It was in July sometime.

Q. 1940?

A. Yes sir.

Mr. Whitwell: I just want to ask this for my own information. I am going fishing a little bit.

Q. Were you paid the contractual wage rate during the time that you were making that run that you considered yourself cubbing?

A. No sir, I received no pay whatever for it.

Q. Does the organization have any rules and regulations or agreement in reference to that?

A. None whatever.

By the Court:

Q. Do you know any other instance where that practice was followed that some old already-qualified engineer changed divisions and cubbed without pay?

A. The only one I could state myself.

Q. You don't know of any others?

A. Not that I know of; not that I have personal knowledge of.

By Mr. Jansen:

Q. I will ask you—you are familiar generally with the practice of the Railroad?

A. Yes sir.

Q. Do you know if that is the practice with reference to others, not as a specific case, but do you know if that is the practice?

A. I might explain in this manner. When I was set up conditions were different to what exist now and it is customary now that when these men are set up that they place the traveling engineer with them the first trip. In other

words, the traveling engineer instructs them and they operate the engine and they receive pay for it.

By the Court:

Q. And get the standard rate of pay?

A. Yes sir.

Q. Just supervised by the traveling engineer?

A. Yes sir.

Q. How long has that practice been going on?

A. I couldn't tell you, Judge.

Q. Well, about how long?

A. Well, now, guessing—

Q. Well, let's not guess, if you don't know.

A. It has been done for the last two years, eighteen months or two years.

By Mr. Jansen:

Q. You mean that is something that came up because of the war emergency and the need of men?

A. On account of the scarcity of manpower.

Q. But before it was the practice to do as they did with you?

A. Yes sir.

By Mr. Whitwell:

Q. If I understood you, you know of no other case where that has happened except your own case, do you?

A. My own case that I have personal knowledge of.

Q. You don't know that the Company or the management had any knowledge of that and you reported nothing about that trip, did you?

A. I was instructed by the engine dispatcher that before I could run the Nashville Division I would have to cub the road.

Q. But you know of no other case except your own where that has happened?

A. No sir, not that I know of.

Further this witness saith not.

The Court: Anything else for the plaintiff?

Mr. Jansen: We rest.

This was all the evidence offered on the hearing of this case.

(Argument of counsel.)

The Court: All right, I will take the matter under advisement and send you copy of my findings when they are reached.

(Adjournment.)

ORDER.

(Received for Entry, 7-12-1945.)

This cause came on this date to be heard on the motion of appellant that the exhibits introduced in evidence at the trial of this cause be sent to the United States Circuit Court of Appeals for the Sixth Circuit in their original form, and it appearing that Government's Exhibits 1, 3 and 4 are appellee's personnel records which must be retained by appellee at its office;

Now, therefore, by agreement of counsel It Is Ordered that photographs be substituted for the originals of Government's Exhibits 1, 3 and 4, and that said photographs be forwarded to the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, in lieu of said

original exhibits, and that all other exhibits be sent up in their original form subject to the further order of the Circuit Court of Appeals with respect thereto.

This the 12th day of July, 1945.

(S) ELMER D. DAVIES,
United States District Judge.

Approved for Entry:

JETER S. RAY,
PAUL M. CADRA,
Attorneys for Appellant.

(S) WALTON WHITWELL,
(S) EDWIN F. HUNT,
Attorneys for Appellee.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Filed May 22, 1945.)

The question here presented is whether or not persons in training for positions with the defendant Railway are, during their training period, "employees" within the meaning of the Fair Labor Standards Act of 1938, 29 USCA 201, et seq. Asserting that they are employees, and that defendant is in violation of the Act with respect to them, plaintiff Administrator seeks injunctive relief to compel future obedience to the Act.

The controversy concerns: First, persons in training for firemen, brakemen and switchmen, both in the yards and on the main line, called "cubs." Second, persons in training for clerks, stenographers, callers, messengers, and the like, called "posters."

It is obvious that an inexperienced person cannot safely perform the intricate and hazardous duties of a railway fireman, brakeman or switchman. Experience and specialized learning are essential, not only to efficiency, but to the public safety and to the safety of the trainmen. Even though a person is generally experienced in railroading, he must still learn the yards, tracks, signals, mechanical devices, and many other things pertaining to the particular railroad on which he is employed, before he can perform his duties with safety to himself and to the public.

In keeping with the custom of all railroads, this defendant requires applicants for such employment to undergo a period of preliminary training, called "cubbing," under the tutelage of a regular employee performing the same type of work. This training period covers from one to three weeks, depending upon the student's aptitude, during which time the trainee accompanies a regular crew who show him on the job how to perform the duties of that employment. The student learns not only by observation, but by actually performing the duties of the employment he seeks, always under the immediate supervision of a regular employee. When the student has apparently become proficient he is given an examination touching his qualifications. If he thus demonstrates his proficiency, he is then, but not before, placed upon the "extra board" as an employee, and called into service as needed. It is only from that time that they are regarded as employees. Their seniority with other employees dates from that time, not from the time they commenced training. This practice is approved by the railway brotherhoods who bargain with the employer on behalf of its employees. Under these contracts one is not deemed an employee until he has finished his training and has been listed on the extra board.

As experience is also necessary in the second classification (clerks, messengers, etc.), though perhaps not to the same extent as in the case of the trainmen, applicants for these positions are required, in the same manner, to undergo a brief period of preliminary training, called

"posting," under a regular employee performing that type of work. Although their duties are clerical or non-operational in character, many of them are frequently required to be in and about the yards, where their own personal safety is at stake. Even the purely clerical employee must have the necessary experience to fit him to work harmoniously as an integral part of a highly specialized transportation system. The training period for these students is from three to ten days, after which they are put into a regular job when needed. During this training period these students accompany a regular employee, or under the guidance of a regular employee perform the duties of the job for which they are fitting themselves.

The plaintiff Administrator contends, and defendant denies, that during this training period these students or trainees are also "employees" within the meaning of the Act and that they should be compensated, and records kept for them, as required by the Act and regulations thereunder.

When a trainee enters upon his training, he does not regard himself as an employee, nor does the Company so regard him. He understands that he is under no obligation to become a regular employee when he finishes his training, nor is the Company under any obligation to so retain him. Whether or not he remains as an employee is entirely optional with him. During the training period the Company exercises no authority or control over his activities, nor over the manner in which they are performed. He is not subject to discipline as an employee. No orders are issued to him, although he is given a suggested schedule to follow, which authorizes him to join a certain crew at a designated time. He is at liberty to do so or not, at his election. If he is absent, such absence does not in the slightest affect the movement of trains, or other work, as the trainee does no independent work and assumes no responsibility. There is always a regular employee to perform the duties of the job, who is responsible for the proper performance of the duties being learned by the student, and who receives standard pay

therefor under the labor contracts. Students are present on the job solely for their own benefit and advantage, in order to qualify themselves for future employment. They are under no obligation to do any work whatever, nor even to report for duty, and when they do perform work it is not to serve the Company, but to enable them to learn the job. The regular paid employee is always there to do the work, and would do it but for the intervention of the student in his own interest. Thus the student performs no work for the benefit of the Company, nor in its interest. He simply accompanies a regular employee on the job, and from him and from the student's own practice, learns the duties of the job. The Company gains nothing from his presence as a student, other than the remote potential advantage of building up a pool of trained persons who will be available as employees when needed. This advantage is diminished to the vanishing point by the fact that it is wholly optional with the trainee whether or not he enters the Company's employ when called.

For the purpose of this Act, whether or not the relationship of employer and employee exists is to be determined upon principles of contract. Tort cases relating to that relationship are inapplicable. In order that wages become due, to which the protection of this Act applies, there must be a contract of employment, either express or implied. It is indispensable to the existence of such a contract that the employee perform some service for the benefit of the employer, or in his interest, of which the payment of wages is the quid pro quo. The performance of such a service is here wholly lacking, as is all other indicia of employment, including the authority to direct and control the activities of the employee. Thus during their training period these trainees act only for their own benefit and in their own interest. Their activities are wholly voluntary. No measurable benefit flows to the Company, for which the law would imply an obligation to pay. It is in this respect that this case fundamentally differs from Walling v. Needlecrafts (C. C. A. 6) 139 Fed. (2d) 60, relied on by plaintiff. There the workers labored and produced for the benefit of the employer in circumstances in which the law will imply an obligation

to pay them, even though their work was not performed under the direct supervision of the employer. Here, the trainee works, not for the Company, but for himself and produces nothing of benefit to the Company. The law therefore implies no obligation to pay him.

Save in one particular, the "cub" or trainman students here involved are the exact counterparts of those held to be mere students, not employees, in Walling v. Jacksonville Terminal Company (C. C. A.-5, decided April 23, 1945), ... Fed. (2d) ... In the Jacksonville Terminal case the trainees received no remuneration whatever. Since about December 1, 1943, the "cub" trainees here involved have received a flat $5.00 per day, except for a short period when such payments were made only to those who completed their training. This payment is now made to all "cubs," regardless of whether their training is completed. The Company is endeavoring to also pay those from whom such payments were formerly withheld because they did not complete their training. As rapidly as these former uncompensated trainees can be located their back compensation is paid them.

The payment of wages is one of the indicia of a contract of employment. This $5.00 per day paid to the "cub" trainees, however, is more a gratuity than compensation, for these trainees render no beneficial service to the Company to earn any "wages," for the recipients of these payments are working for themselves, not for the Company. Nor are they under the direction or control of the Company as an employee would be.

These payments were commenced in 1943, not because the Company considered that the trainees performed services of value, but pursuant to the recommendation of a joint committee of railway and labor executives, which committee referred to the payment as "pre-employment" pay, and recommended that the payments be made because many of these trainees were married men with dependents who could not afford to undergo a period of training without some source of income. In making the payments the Company regards them as incentive pay, not wages.

The Court therefore holds that this gratuitous payment by the Company of "pre-employment" pay does not fundamentally alter the status of these "cub" trainees, and that they are not employees within the meaning of the Act, for the reasons so well stated by Judge Sibley in the Jacksonville Terminal Company case, supra.

But even if they were employees, this payment substantially complies with the requirements of the Act. Most of these "cubs" devoted eight hours a day, at most, to their training, so these are paid at the rate of sixty-two and one-half cents per hour. Some of them, while "cubbing" on local main line trains, are in training twelve hours per day, which produces a compensation of a little more than forty cents per hour. It is only in the relatively small number of cases where "cubs" are training on main line trains which are late in reaching their ultimate destination that they are in training more than twelve hours per day so that the sum actually received by them in such instances falls slightly below the forty cents per hour minimum required by the Act. These instances are relatively few. So in a broad and substantial sense, and subject to occasional exceptions, these "cubs" actually received compensation in accordance with the Act.

As to the "poster" (office) trainees: For the same general reasons above stated, the Court holds that these are not "employees" within the meaning of the Act. But even if they are, the Company is now and for several years past has been complying with the Act as to them, and apparently intends in good faith to do so in the future.

Originally, these trainees were not compensated during their training period. Beginning, however, about 1941, the management of the Company, although not conceding then or now that they are "employees," issued instructions to pay them a sum equal to the minimum requirements of the Act, and to keep the records on them required by the Act. These instructions were generally carried out over the defendant's system, and still are. Due however to a misunderstanding of these instructions at

the Craven yards at Chattanooga, these "poster" trainees were not so paid for a substantial period of time after the custom of paying such trainees was instituted. When this failure was discovered, it was immediately corrected by issuing pay vouchers covering this period, many of which have been delivered to the payees, and the remainder being delivered as rapidly as the former trainees can be located for that purpose. All such trainees have been paid in accordance with the Act, and proper records kept for six months or more last past. So even if they are "employees," which the Court holds that they are not, there is no necessity for an injunction, the purpose of an injunction being to prevent future violations, not to punish past violations.

Nor are these trainees "learners" as contemplated by the Act. A "learner" is an employee who labors in the interest and for the benefit of his employer, and who produces something, or performs a service in the employer's interest, but due to inexperience or some other handicap the product of his labor is inferior to that of an experienced worker. The point of cleavage is that the "learner," though his product be inferior or limited, is nevertheless working for the benefit of his employer and contributing to the employer's interest as far as the learner's capabilities permit, while the trainees here involved are working solely for themselves. The Company gains no measurable benefit from their activities.

The Court holds that none of these trainees are "employees" within the meaning of the Act. But even if they are employees, the payments voluntarily made to them, and the records now kept, are sufficient to satisfy the requirements of the Act.

Nashville, Tennessee,
May 22, 1945.

/s/ LOUIE W. STRUM,
United States District Judge.

FINAL JUDGMENT.

(Received for Entry, May 22, 1945.)

The Court having heard the evidence of the respective parties, and the argument of their counsel, it is upon consideration thereof

Ordered and Adjudged:

1. The relief sought by the complaint herein is denied, and the defendant shall go hence without day.

Done and ordered at Nashville, Tennessee, May 22, 1945.

/s/ LOUIE W. STRUM,
United States District Judge.

NOTICE OF APPEAL.

(Filed July 3, 1945.)

Notice is hereby given that L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, plaintiff in the above styled action,

hereby appeals to the United States Circuit Court of Appeals for the Sixth Circuit from the final judgment entered in this action on May 22, 1945.

Dated July 3, 1945.

/s/ DOUGLAS B. MAGGS,
Solicitor,

/s/ ARCHIBALD COX,
Associate Solicitor,

/s/ JETER S. RAY,
Regional Attorney,

/s/ GEORGE W. JANSEN,
Supervising Attorney,

Attorneys for L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor.

Post Office Address:

c/o Solicitor of Labor,
U. S. Department of Labor,
503 Medical Arts Building,
Nashville 3, Tenn.,

or

Solicitor of Labor,
U. S. Department of Labor,
Washington 25, D. C.

STATEMENT OF POINTS.

(Filed July 3, 1945.)

L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, appellant in the above-entitled action, now designates the points on which he will rely in the prosecution of his appeal from the judgment entered in this action on May 22, 1945:

1. That the court erred in ruling that trainees for the jobs of porters, callers, messengers, stenographers, clerks, switchmen, firemen, and brakemen at defendant's railroad office, yard, and system were not employees of the defendant within the meaning of the Fair Labor Standards Act of 1938 during the period when they were learning the duties and functions of the jobs.

2. That the court erred in denying the plaintiff an injunction as prayed in his complaint.

Dated July 3, 1945.

/s/ DOUGLAS B. MAGGS,
Solicitor,

/s/ ARCHIBALD COX,
Associate Solicitor,

/s/ JETER S. RAY,
Regional Attorney,

/s/ GEORGE W. JANSEN,
Supervising Attorney,

Attorneys for L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor.

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or
Solicitor of Labor,
U. S. Department of Labor,
Washington 25, D. C.

DESIGNATION OF RECORD.

(Filed July 3, 1945.)

To: The Clerk of the District Court of the United States for the Middle District of Tennessee:

In accordance with Rule 75 (a) of the Federal Rules of Civil Procedure, you are requested to make a transcript of the record in the above styled action, pursuant to the notice of appeal filed therein, said transcript of record to contain the following:

1. Plaintiff's complaint.

2. Defendant's Answer.

3. Deposition of John Harrison Whitten taken by plaintiff in Chattanooga, Tennessee on May 8 and 9, 1945.

4. Complete transcription of the proceedings at the trial beginning on May 16, 1945, including all exhibits.

5. Findings of fact and conclusions of law dated and filed May 22, 1945.

6. Judgment entered and dated May 22, 1945.

7. Notice of appeal with date of filing.

8. The statement of points.

9. This designation.

You are requested to prepare said transcript of record in accordance with Rule 75 of the Rules of Civil Procedure for the District Courts of the United States and to transmit the same to the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit within 40 days

from the date of the notice of appeal, or within such extended period, not exceeding 90 days from said date as may be ordered by the District Judge.

Dated July 3, 1945.

/s/ DOUGLAS B. MAGGS,
Solicitor,

/s/ ARCHIBALD COX,
Associate Solicitor,

/s/ JETER S. RAY,
Regional Attorney,

/s/ GEORGE W. JANSEN,
Supervising Attorney,

Attorneys for L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor.

Post Office Address:

c/o Solicitor of Labor,
U. S. Department of Labor,
503 Medical Arts Building,
Nashville 3, Tennessee,

or

Solicitor of Labor,
U. S. Department of Labor,
Washington 25, D. C.

I, Jeter S. Ray, one of the attorneys of record for L. Metcalfe Walling, Administrator of the Wage and Hour Division, United States Department of Labor, do hereby certify that on the 3 day of July, 1945, a copy of the foregoing designation of record was mailed to Wm. H. Swiggart, Esquire, Walton Whitwell, Esquire, and Edwin F. Hunt, Esquire, attorneys of record for The Nashville, Chattanooga and St. Louis Railway in Government franked envelopes to 930 Broad Street, Nashville, Tennessee, the same being their last known address.

/s/ JETER S. RAY.

CERTIFICATE OF CLERK.

I, L. B. Ormes, Clerk of the District Court of the United States, in and for the Middle District of Tennessee, Nashville Division, do hereby certify that the foregoing papers contain a true, correct and complete record as called for in the designation of portions of the record on appeal filed by attorneys for the Appellee-Defendant herein, in the matter set out in the caption hereto, as the same appears from the records in this cause and the files of this office.

Witness my hand as Clerk and seal of said court, at my office in Nashville, Davidson County, Tennessee, Division and District aforesaid, on this the 10th day of July, 1945 and the Independence of the United States of America, the 169th year.

L. B. ORMES, Clerk,
United States District Court,

By PHIL McCABE,
Deputy Clerk.

(Seal)

TRANSCRIPT OF PROCEEDINGS FOR CERTIORARI APPLICATION

Cause argued and submitted

April 12, 1946

Before HICKS, ALLEN, and MILLER, JJ.

This cause is argued by George W. Jansen and Morton Liftin for Appellant and by Walton Whitwell for Appellee and is submitted to the Court.

Judgment

Entered June 1, 1946

Appeal from the District Court of the United States for the Middle District of Tennessee.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Tennessee, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby affirmed.

Opinion

Filed June 1, 1946

United States Circuit Court of Appeals, Sixth Circuit

No. 10070

L. METCALFE WALLING, ADMINISTRATOR WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, APPELLEE

Appeal from the District Court of the United States for the Middle District of Tennessee

Decided June 1, 1946

Before HICKS, ALLEN, and MILLER, Circuit Judges

HICKS, Circuit Judge. Appellee, The Nashville, Chattanooga & St. Louis Railway, is an interstate common carrier of passen-

gers for hire. It operates in the States of Tennessee, Alabama, Georgia and Kentucky, and maintains offices, shops, yards and terminals at various places over its system and employs approximately 12,000 people.

On December 19, 1944, appellant filed his complaint against appellee under Sec. 17 of the Fair Labor Standards Act (c. 676, 52 Stat. 1060, 29 USC, sec. 201 et seq.) to restrain appellee from violating Sections 15 (a) (2) and 15 (a) (5) of the Act. The complaint alleged that it had violated the minimum wage and record keeping provisions of the Act with respect to 225 employees, including firemen, switchmen, stenographers, yard clerks, office clerks, messengers, callers and porters during their so-called "training periods."

Appellee's principal defense was that these "trainees" were not "employees" within the meaning of the Act.

The District Court filed findings of fact and conclusions of law and denied the relief sought, chiefly upon the authority of Walling v. Jacksonville Terminal Co., 148 Fed. (2d) 768 (C. C. A. 5).[1]

The persons involved were in training for positions as porters, callers, messengers, stenographers and clerks, who were commonly called "posters" and as firemen, switchmen and brakemen, who were commonly called "cubs." It is uncontroverted that in each of these different positions a period of preliminary training is essential to the efficiency of the applicant therefor, as well as his safety and that of the public. It would be unthinkable to subject the lives of employees and passengers, to say nothing of property, to the hazards which would arise from the use of untrained and incompetent servants. A training period is mandatory.

Upon the question whether such persons are trainees or employees, the court found the following material facts:

> "When a trainee enters upon his training, he does not regard himself as an employee, nor does the Company so regard him. He understands that he is under no obligation to become a regular employee when he finishes his training, nor is the Company under any obligation to so retain him. Whether or not he remains as an employee is entirely optional with him. During the training period the Company exercises no authority or control over his activities, nor over the manner in which they are performed. He is not subject to discipline as an employee. No orders are issued to him, although he is given a suggested schedule to follow, which authorizes him to join a certain crew at a designated time. He is at liberty to do so or not, at his election. If he is absent, such absence

[1] See also *L. Metcalfe Walling, Admr. v. Portland Terminal Co.*, decided by the First Circuit on April 29, 1946.

does not in the slightest affect the movement of trains, or other work, as the trainee does no independent work and assumes no responsibility. There is always a regular employee to perform the duties of the job, who is responsible for the proper performance of the duties being learned by the student, and who receives standard pay therefor under the labor contracts. Students are present on the job solely for their own benefit and advantage, in order to qualify themselves for future employment. They are under no obligation to do any work whatever, nor even to report for duty, and when they do perform work it is not to serve the Company, but to enable them to learn the job. The regular paid employee is always there to do the work, and would do it but for the intervention of the student in his own interest. Thus the student performs no work for the benefit of the Company, nor in its interest. He simply accompanies a regular employee on the job, and from him and from the student's own practice, learns the duties of the job. The Company gains nothing from his presence as a student, other than the remote potential advantage of building up a pool of trained persons who will be available as employees when needed. This advantage is diminished to the vanishing point by the fact that it is wholly optional with the trainee whether or not he enters the Company's employ when called."

Without going into detail, we conclude that these findings have ample support in the evidence. They are certainly not "clearly erroneous" and we are bound by them. See Federal Rules of Civil Procedure, Rule 52 (28 USCA following 723c). We have heretofore consistently followed this rule. Hazeltine Corp. v. Crosley Corp., 130 Fed. (2d) 344 (C. C. A. 6). There is indeed no special controversy over the facts.

It follows that there is presented for review a clear cut question of law, whether persons in training for the positions indicated above were "employees" of appellee during their training period within the meaning of the Fair Labor Standards Act of 1938. It is our duty to review this question; and we remain free to draw from the findings the ultimate inferences and conclusions. Letcher County v. DeFoe, 151 Fed. (2d) 987, 990 (C. C. A. 6); Harris Stanley Coal & Land Co. v. C. & O. Ry. Co., decided by us April 3, 1946.

Section 3 (c) of the Act defines "employee" as an individual employed by an employer; and Sec. 3 (g) defines the word "employ," to mean "to suffer or permit" the trainees to work. See Walling v. Sanders, 136 Fed. (2d) 78, 81 (C. C. A. 6). Appellant's difficulty here is that the findings conclusively establish that appellee did

not "suffer or permit" the trainees to work for it. See Walling v. Jacksonville Terminal Co., supra (148 Fed. 2d, at page 770). The fact that the trainees necessarily used the facilities of appellee during their training period does not carry an inference that they worked for appellee. If trainees are to be considered as "employees" then the long entertained concept of voluntary apprenticeship passes entirely away. The Jacksonville case, upon its facts, is in all material aspects similar to the case in hand, and we are satisfied with the reasoning thereof. To say more would constitute surplusage.

The decree is affirmed upon the authority of that case and for the reasons indicated therein.

Appellee insists that, even if the provisions of the Act are applicable to trainees as employees, nevertheless it is as a matter of fact complying with the Act and that therefore there is no real basis for an injunction. The court so held but in the view we take of the case no such holding is material to decision.

Affirmed.

ALLEN, Circuit Judge, dissenting. I cannot concur in the conclusion of my colleagues that the cubs and posters are not employees within the meaning of the Fair Labor Standards Act. It seems to me that § 3 (g), which provides that "employ" includes "to suffer or permit to work," was drawn specifically with such loose arrangements as cubbing and posting in mind. Incidentally, the holding seems to contravene a decision of this court. Huntsicker v. Illinois Central Ry. Co., 129 Fed. 548, which held that a trainee was the servant of the railway.

The record presents ample evidence that the cubs and posters not only were instructed as to their duties, but actually did the same work during their training period as they did upon becoming regular employees. In fact they learned the duties by working under supervision. It was the frequent practice of the railway, upon the absence of one of its regular employees, to substitute one of the cubs, and for such service to pay him the usual remuneration for that particular job. The next day this cub might be returned to his trainee status.

The District Court found that the trainees "perform work," but that this work did not benefit the Company. In at least certain instances it seems to me that there is no evidence in support of this finding. Three of the witnesses acted as cubs for periods so long, Arnold, twenty-two days, Prince, five weeks, Rosenheim, six weeks, that their work must have had some value or they would not have been tolerated. Boyd, Justice and Eason had had previous railroad experience, but were compelled to cub. Childers, who had twelve years previous experience in a shipping office, was forced to

cub in clerical work more than two weeks. It is argued that the cubs were not compelled to take their training at any specific time, but while on the trains in the yards and on duty in the offices they were subject to the railroad's control. I think that work performed by such trained persons clearly benefited the company, and that there is no substantial evidence to the contrary.

However, the statutory test is not benefit but whether these cubs and posters were suffered or permitted to work. If they were they are employees. Plainly they were permitted to work, and actually did work. Since they spent time on the employer's premises subject to call at least for certain periods, the time they spent was working time within the Fair Labor Standards Act. Armour & Co. v. Wantick, 323 U. S. 126, 132, 133.

The decree should be reversed.

United States Circuit Court of Appeals

for the Sixth Circuit

I, J. W. Menzies, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of record and proceedings in the case of L. Metcalfe Walling, Admr., vs. Nashville, Chattanooga & St. Louis Railway, No. 10070, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 15th day of July A. D. 1946.

[SEAL.]

J. W. MENZIES,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

U. S. GOVERNMENT PRINTING OFFICE: 1946

SUPREME COURT OF THE UNITED STATES

Order allowing certiorari

Filed October 14, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.